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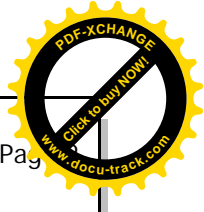
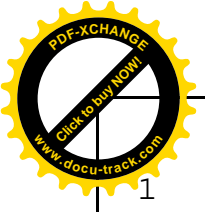
1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS
3

4 In re:)
5 PHARMACEUTICAL INDUSTRY) CA No. 01-12257-PBS
6 AVERAGE WHOLESALE PRICE) MDL No. 1456
7 LITIGATION)
8

9 MOTION HEARING
10 BEFORE THE HONORABLE PATTI B. SARIS
11 UNITED STATES DISTRICT JUDGE
12
13

14 United States District Court
15 1 Courthouse Way, Courtroom 19
16 Boston, Massachusetts
17 January 27, 2006, 2:10 p.m.
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23 LEE A. MARZILLI
24 CERTIFIED REALTIME REPORTER
25 United States District Court
1 Courthouse Way, Room 3205
Boston, MA 02210
(617)345-6787



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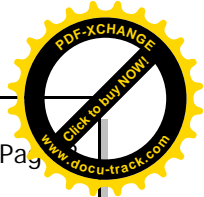
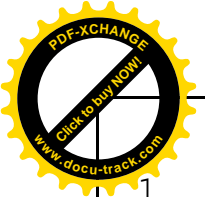
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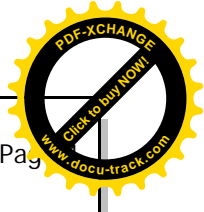
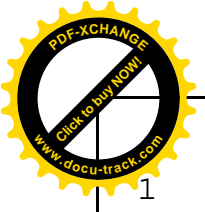
1 A P P E A R A N C E S: (Continued)

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P R O C E E D I N G S

THE CLERK: In re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action No. 01-12257, MDL No. 1456, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. SOBOL: Good afternoon, your Honor. Tom Sobol for the MDL plaintiffs.

MR. HAVILAND: Good afternoon, your Honor. Don Haviland, Kline & Specter, for Local 68 and (Inaudible.)

THE COURT: You need to speak up, okay?

MR. HAVILAND: Sure thing.

THE COURT: Everybody needs to hear you behind.

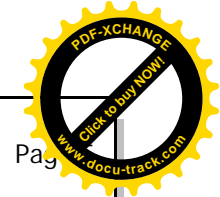
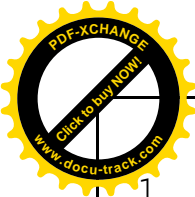
MS. BENEDETTO: Good afternoon, your Honor. TerriAnne Benedetto from Kline & Specter on behalf of Local 68.

MR. SULLIVAN: Good afternoon, your Honor. Stephen Sullivan from Lynch Keefe Bartels, also on behalf of Local 68.

MR. LIBMAN: Good afternoon, your Honor. Robert Libman on behalf of the State of Illinois and the Commonwealth of Kentucky.

MR. JOHNSTONE: David Johnstone, Assistant Attorney General, for the Commonwealth of Kentucky.

MS. HUNT: Good afternoon, your Honor. Carol Hunt on behalf of the people of the state of New York.



1 MR. THOMAS: Mark Thomas, state of Florida.

2 THE COURT: Do you want to go up with the other
3 AGs, or are you happy back there? Where are you from? Are
4 you from New York as well?

5 MS. THOMAS: No. Susan Thomas for the relator
6 Ven-A-Care for the state of Florida.

7 THE COURT: All right, any other states,
8 commonwealths, attorney generals? All right, okay, there we
9 go. All right, now --

10 MR. LYNCH: Mark Lynch, your Honor, for
11 GlaxoSmithKline.

12 MR. MONTGOMERY: John Montgomery, your Honor, for
13 Schering-Plough and Warrick.

14 MR. FLEDER: John Fleder for the pharma defendants.

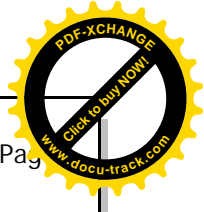
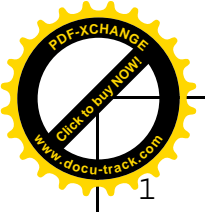
15 MS. WITT: Helen Witt on behalf of Boehringer
16 Ingelheim.

17 MR. THEODOROU: Nicholas Theodorou for AstraZeneca,
18 your Honor.

19 MR. FLYNN: Michael Flynn for AstraZeneca, your
20 Honor.

21 MR. COONER: David Cooner for AstraZeneca, your
22 Honor.

23 THE COURT: Have you all spoken as to the priority
24 or the lineup? Does anyone have a plane to catch that you
25 cannot miss? All right, so why don't we start off with what



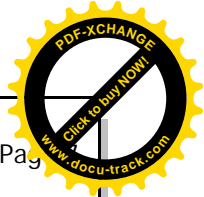
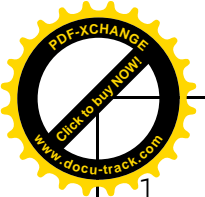
1 I view as the simpler, I think the easiest issue, not
2 necessarily the one whether or not a new Supreme Court
3 decision is an order, and easy in terms of it's very narrow
4 and it's a one-issue kind of thing. Then I thought I'd move
5 into the fraudulent joinder/ -- I guess you'd have to call it
6 material misrepresentation and petition case, which is I
7 think Florida, right, the local case? And then move into the
8 last which is the most difficult, I think substantively,
9 which is the Florida Medicaid statute and whether that's a
10 substantial federal question.

11 Am I missing something, any of these cases?

12 MR. LIBMAN: The only other issue, and hopefully we
13 won't need to reach it, but beyond the timeliness issue for
14 Illinois, Kentucky, and I believe New York as well, is if you
15 find timely removal, whether there is in fact a federal
16 question here under Grable.

17 THE COURT: Right, fair enough. All right, so
18 who's going to argue -- I guess what we literally have
19 pending is the motion to remand, and who's going to argue on
20 behalf of the states? Are you all arguing separately?

21 MR. LIBMAN: Your Honor, Robert Libman. I intend
22 to argue for Illinois and Kentucky. Carol Hunt and I have
23 spoken to the extent that there's some additional argument
24 that's necessary or some issues unique to New York that
25 Ms. Hunt would like to make, but I intend to speak primarily



1 for Illinois and Kentucky.

2 THE COURT: Well, I think that's a good place to
3 start.

4 MS. HUNT: I won't be overlapping.

5 THE COURT: Sure. And does anybody else want to
6 speak from any of the states?

7 MS. THOMAS: Yes, your Honor. Mark Thomas for the
8 state of Florida.

9 THE COURT: That's not this order issue, right? Or
10 is it? I thought that was a more substantive -- that didn't
11 deal with whether or not it was timely.

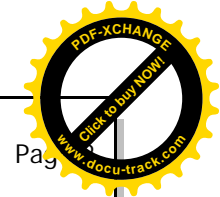
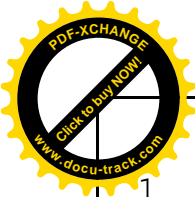
12 MS. THOMAS: Correct. That's the remand issue.

13 THE COURT: Right, but it isn't whether or not it
14 was within the 30 days?

15 MS. THOMAS: Yes.

16 THE COURT: Okay.

17 MR. LIBMAN: Thank you, your Honor. The starting
18 point really for this issue should be the notice of removals
19 themselves for Illinois and Kentucky. And Paragraph 15 of
20 those notices make clear that there is only one basis for the
21 removal, and that is whether the states' claims on behalf of
22 its Medicare Part B beneficiaries raises a federal question.
23 Specifically, the basis for removal, though, is whether the
24 Grable decision issued by the Supreme Court in 2005 is a,
25 quote, "other paper."



1 Now, their briefs make the argument that that
2 decision may also be an order within the meaning of the
3 removal statute, but the notice of removal only relies on the
4 argument that it is a, quote, "other paper." And as our
5 briefs point out, the majority rule is that within the
6 meaning of that removal statute, the "other paper" must be a
7 paper that is within the action itself. That comes from the
8 plain meaning and the plain reading of the statute. It talks
9 about "other papers" being served on a defendant. People
10 don't think of Supreme Court decisions as being served on
11 parties.

12 THE COURT: Is there any law in the First Circuit
13 construing this?

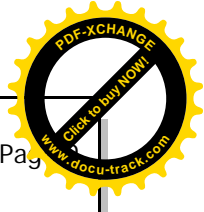
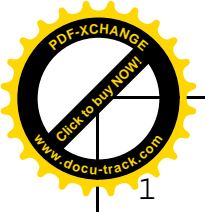
14 MR. LIBMAN: I'm not certain that there is, your
15 Honor, certainly not First Circuit case law that I'm aware
16 of.

17 THE COURT: There's so little appellate case law,
18 in any event.

19 MR. LIBMAN: Right.

20 THE COURT: Apart from the First Circuit, are there
21 other District Court cases directly on point?

22 MR. LIBMAN: I don't believe so, your Honor, at
23 least not that I've located. The majority rule, though, is
24 summarized by the Morsani case we've cited in our brief, I
25 believe from the Middle District of Florida. The point here



1 is that important deadlines, your Honor, should not be
2 subject to dispute. That's the reason for the rule.

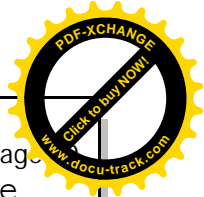
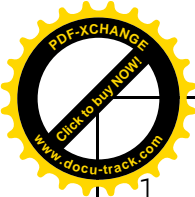
3 THE COURT: Do you know what the batting average
4 is? I know many District Courts have written on it, and
5 there's a divide.

6 MR. LIBMAN: I don't know the precise count, your
7 Honor, but I would say, to me, at least, 70-80 percent of the
8 cases, perhaps more, follow this rule. And the cases that
9 they have cited are including the Smith case where it's
10 explicitly repudiated by another District Court in that same
11 district. But the point is that important deadlines should
12 not be subject to dispute. That's the reason for the rule.

13 I mean, you can imagine, for example, that as there
14 are in this case about the meaning of Grable, if a decision
15 from an appellate court were to trigger a new time for
16 removal, you'd have disagreements about the meaning of that
17 court decision as well as the date that the party, quote,
18 "received" the decision.

19 We're urging the Court to just look at the plain
20 language of the removal statute, an "other paper," there's
21 got to be a paper that was within the same case.

22 Now, they've cited the Doe V. Red Cross and the
23 Green cases, which I should point out initially only speak to
24 the issue of whether a Supreme Court or appellate court
25 decision is an order within the meaning of the removal



1 statute. And as I've explained, the notices of removal here
2 do not make that argument.

3 THE COURT: Why should that be so important?

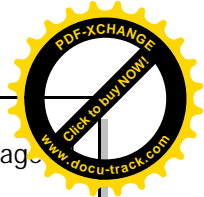
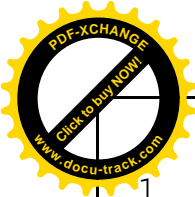
4 MR. LIBMAN: Well, perhaps it's not, but I think if
5 you're going to look at the notice of removal itself, which I
6 think is -- unless they're going to be allowed to make new
7 arguments every time while we're waiting for this issue to be
8 resolved --

9 THE COURT: The removal issue I can see. You're
10 supposed to put in the petition the basis for removal.

11 MR. LIBMAN: Yes.

12 THE COURT: But the paper versus the order, I don't
13 know if that would --

14 MR. LIBMAN: I can knock it down anyway, your
15 Honor. That is, Doe and Green themselves, first of all,
16 recognized the majority rule which I just cited to you, which
17 is that the order, if it is an order, of another appellate
18 court should be within the same -- come from the same case.
19 And it's a very narrow exception that Doe and Green carved
20 out, and it's a four-part test, and they took great pains to
21 say that this was a narrow exception as well. The four-part
22 test is whether the case comes from a court superior in
23 judicial hierarchy -- I'll concede that's been met here, the
24 Supreme Court -- or whether it's directed to a particular
25 defendant. It must expressly authorize that same defendant

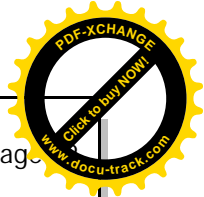
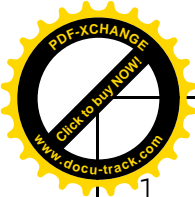


1 to remove an action against another case, and the case must
2 involve similar facts and legal issues. And none of those
3 last three factors have been met here.

4 That really should be the end of the inquiry.
5 Simply, Doe and Green do not support removal here. And in
6 fact the defendants are not asking you simply to apply the
7 Green and Doe cases here. They're asking you to go beyond
8 what Green and Doe held for the reasons I just said: This
9 does not involve a case with the same defendants, there's no
10 express authorization for removal of the case, and certainly
11 no similar facts or legal issues. So they're looking for an
12 expansion of Doe and Green.

13 The problem, of course, is that the litigation
14 floodgates would open if every time an appellate court
15 decision came down it would start the removal clock again,
16 and that's clearly not what was contemplated by Congress when
17 they enacted the statute. So we would urge you again to just
18 simply apply the plain meaning of the statute and find that a
19 Supreme Court decision is not an "other paper" or an order
20 within the meaning of the removal statute.

21 I would also like to briefly touch on a second
22 argument, which is whether the Grable case, even if you
23 consider it to be an order within the meaning of the removal
24 statute, was when the defendants, quote ". . . first
25 ascertained that the case was removable." That's also a



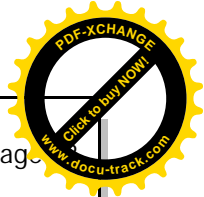
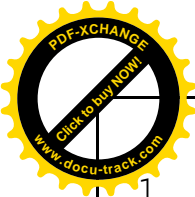
1 requirement of the removal statute itself. And their
2 argument again is that a decision you issued in June of 2003
3 essentially would have foreclosed them from removing; you
4 would have certainly remanded these cases if they had removed
5 at the time.

6 There's a number of reasons why that argument
7 simply is without merit. First is that less than a month
8 after you issued that decision, many of the defendants in our
9 cases removed the Local 68 case. That is, they -- and the
10 notice of removal there said the very same basis for removal
11 that is cited in the notices of removal as to Illinois and
12 Kentucky, that the Medicare Part B claims raised a
13 substantial federal question as to the meaning of AWP. So
14 many of the defendants themselves realized at that time that
15 your opinion didn't foreclose them from removing. They in
16 fact did remove.

17 Secondly, as to the three Kentucky cases --

18 THE COURT: Well, it's always a good question. In
19 many of these cases, there's screaming, "This is frivolous.
20 Give us attorneys' fees." But once I've ruled under First
21 Circuit law, which I think I had no choice in doing because
22 our Circuit followed one split in the analysis, which is you
23 had to have a cause of action, once I followed that, it was
24 pretty hopeless.

25 MR. LIBMAN: Well, then why did they remove the



1 Local 68 case on the same basis?

2 THE COURT: I can't answer that.

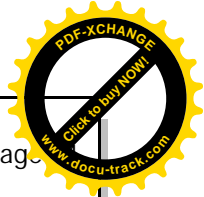
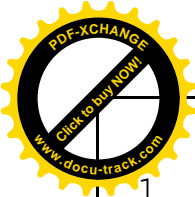
3 MR. LIBMAN: I can't either, and I don't think
4 anyone can. Well, perhaps the defendants can.

5 But, additionally, let me ask you to focus on the
6 Sixth Circuit case law as well. Grable was a case that came
7 from the Sixth Circuit. In the Grable decision, the Supreme
8 Court affirmed the Sixth Circuit opinion in Grable.

9 Now, the Sixth Circuit opinion was decided in July
10 of 2004. And as to the three Kentucky cases, two of them
11 were filed prior to that time, and the Grable case in that
12 event may not have been the controlling law. But clearly as
13 to the third Kentucky case, which is the larger one -- and
14 for the record, it's civil action here 05-12493 -- was filed
15 in November of 2000. So the controlling law in the
16 Sixth Circuit was that the lack of a private right of action
17 did not per se preclude --

18 THE COURT: Were they in the other split? In other
19 words, I can't remember how it lined up, but there were a
20 group of circuits that went one way and a group of circuits
21 that had gone another way.

22 MR. LIBMAN: The Supreme Court only cites the
23 Sixth Circuit and then a Seventh Circuit opinion that went
24 the other way. Those are the only two. The Sixth Circuit
25 was affirmed by Grable.



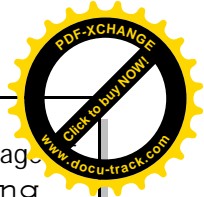
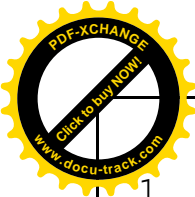
1 THE COURT: Right. And I think the First Circuit
2 cited the Seventh Circuit, if I remember.

3 MR. LIBMAN: It had, and I'll get to the First
4 Circuit in a moment, however, your Honor. But in the
5 Sixth Circuit, the law was not changed by the Supreme Court
6 decision in Grable. And they have argued that the law of the
7 Sixth Circuit wouldn't apply; they would have notified the
8 JPML and had it transferred over here, and you would have to
9 apply, being the transferee court, the law of the First
10 Circuit.

11 There was a case, and I don't think it's cited in
12 our brief, but the Templeton case out of the First Circuit
13 that was decided shortly after your opinion in June of 2003,
14 and the Templeton decision is consistent with what the
15 Supreme Court said in Grable. In fact, just quoting briefly
16 from it, and citing to a previous First Circuit case, the
17 Almond V. Capital Properties case, which I believe you cited
18 in your opinion as well, said, "We believe that Almond also
19 stands for the proposition that there is a discrete type of
20 case where federal subject matter jurisdiction will lie
21 notwithstanding the absence of a federal cause of action."

22 THE COURT: That was a contract case because we had
23 to deal with that line of cases.

24 MR. LIBMAN: The Almond case, right. The Templeton
25 case was not. In any event, my point simply is that the law



1 in the First Circuit, to the extent that you were following
2 case law prior to Templeton, was also in effect at the time
3 of the removal of the Illinois case and the later --

4 THE COURT: All right, thank you. Why don't I get
5 to defense because I don't know that I need to enter into a
6 Grable analysis, which seems quite complicated here.

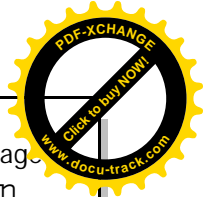
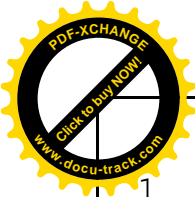
7 MR. LYNCH: I wouldn't think so, your Honor. I
8 think that when you had the Minnesota and Montana cases, you
9 decided that there was a federal question, you remanded
10 because of the lack of a private cause of action. Grable,
11 certiorari was taken, it says right in the opinion was taken
12 for the sole purpose of resolving a split in the circuits as
13 to whether a private cause of action was a necessary
14 condition for federal jurisdiction. And it's true Grable
15 says a lot of things that are kind of complicated, but it's
16 clear that Grable wasn't undertaking to restate the law of
17 what a substantial federal question is.

18 THE COURT: But can we move backwards --

19 MR. LYNCH: Yes, let's move backwards.

20 THE COURT: -- because, I mean, we've done some
21 research, probably not as much as all of you have done. I
22 think it's quite correct that the majority rules against you
23 here.

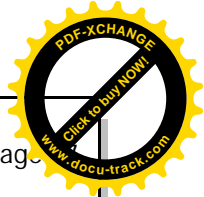
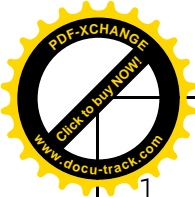
24 MR. LYNCH: The majority of the District Court
25 cases is against us, your Honor. There's no doubt about



1 that. But the key cases here are the Third Circuit decision
2 in Red Cross and the Fifth Circuit decision in Green. And
3 I'll concede right off the bat that the facts here are
4 different, but the inevitable implication of those two
5 circuit cases supports us. The ratio decidendi of those
6 cases supports us, and if you'll give me a little time to go
7 through the facts, I'll explain why that's the case, your
8 Honor.

9 The states want to take the position that 1446(b)
10 is confined to papers or orders within the case that is being
11 removed, and the one thing that the Red Cross and the Green
12 case made clear is that an order or an opinion from another
13 case can start the clock for removal anew. So Green and
14 Red Cross clearly break out of the fence that the states are
15 trying to put around 1446(b) with this so-called rule that it
16 has to be an order or other paper generated within the case
17 that's being removed. That simply isn't what happened in
18 Red Cross and Green.

19 Now, it is true that in Red Cross, Red Cross was a
20 defendant in both cases, and the Supreme Court case included
21 an order that authorized Red Cross to remove its other
22 cases. But the fact remains, it was another case. And in
23 Green the facts get even better for us. In Green, the first
24 case that was removed was remanded because there was no
25 fraudulent joinder. Then the Fifth Circuit decided a case

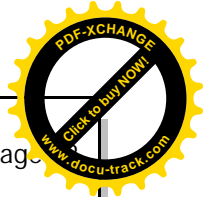
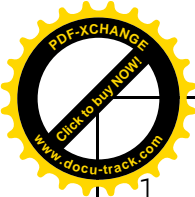


1 construing the Texas product liability statute that made it
2 clear that there was fraudulent joinder; there was no claim
3 against the grocery store, the local grocery store that was
4 sued. And Green was removed again on that basis, and the
5 Fifth Circuit held that the clock had begun to run anew on
6 the basis of its prior decision.

7 Now, in that case, sort of gratuitously, the
8 tobacco companies that were the defendants happened to be
9 defendants in both cases, but the cases were not related the
10 way the Red Cross cases were, and clearly there was no order
11 from the Fifth Circuit explicitly authorizing the tobacco
12 companies to re-remove as was the case in Red Cross.

13 I think what we have here, your Honor, is sort of a
14 classic case of common law expansion of legal principles to
15 different factual situations. And I'll be quite candid that
16 we're asking you to take one more step because none of the
17 parties here, none of the defendants in this case were
18 defendants in Grable. We're asking you to take one more
19 step, but we submit, your Honor, that that step is compelled
20 clearly by the rationale, by the ratio decidendi of those two
21 Circuit cases in Red Cross and Green.

22 THE COURT: But here Grable is a hard case because
23 what Souter is telling me to do is a very nuanced kind of
24 decision. He's saying there are no bright lines here, and no
25 bright lines, you can't use the existence or nonexistence of



1 a cause of action. But the existence of a substantial
2 federal question is not by itself enough either. He asks you
3 to look at some wholistic states and federal government
4 and --

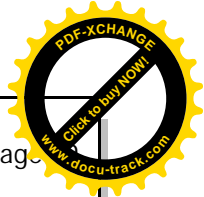
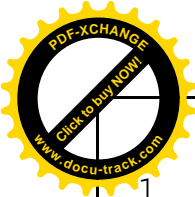
5 MR. LYNCH: Right.

6 THE COURT: That's why I reserved till the last the
7 Florida question. So that even my thought process at the
8 time, which I'm sticking with, which is that it's a
9 substantial federal question, that's not -- what did he call
10 it? -- that may be a welcome mat but not the key? I forget
11 his metaphor. What's the response to his point, which is,
12 every time there's a new federal case, bang, you have to
13 reexamine the whole removal analysis?

14 MR. LYNCH: The Grable decision is one of those
15 Supreme Court decisions that makes life hard for district
16 judges and litigators. There's no doubt about that. But the
17 key thing, I think -- I think what Justice Souter does in
18 Grable is, he says: If there is a substantial federal
19 question, federal jurisdiction may still be subject to veto.
20 And then he gets into this question of whether exercising
21 federal jurisdiction would upset any Congressionally approved
22 balance of labor between the state and Federal Courts.

23 THE COURT: Well, that's particularly poignant in
24 our case.

25 MR. LYNCH: I think, in our view, you've already



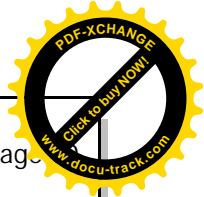
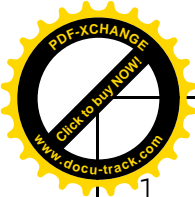
1 got state cases here.

2 THE COURT: No, but it's also true that the federal
3 government entrusted to the states -- in other words, we can
4 have this big debate, which I expect to have in about a half
5 an hour, but all I'm saying is, I think the thing that
6 strikes me the most is the argument that you need some
7 finality in where you're going to be. And unless there's a
8 slam-dunk opinion as there was in Red Cross where for sure
9 just, you know, there's a clear-cut question of law, if I
10 were doing this, wouldn't I be inviting an appeal in
11 absolutely every case that was remanded for any appellate
12 case that arguably undercut the rationale?

13 MR. LYNCH: I don't think so, your Honor, and
14 you've thrown up several issues for me to address there.
15 First of all, when you're talking about -- well, let's go
16 back to this division of labor between the state and Federal
17 Courts. We are removing on the basis of state claims seeking
18 to recover on behalf of Medicare beneficiaries. The Florida
19 case is a Medicaid case only. There aren't claims for
20 Medicare beneficiaries. And as you said last week when we
21 were here, Medicare beneficiaries are your people.

22 THE COURT: Right, they're federal protectees, if
23 you will.

24 MR. LYNCH: The claims for Medicare beneficiaries
25 are thoroughly subfused with federal interests, and I think

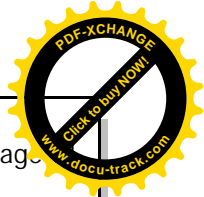
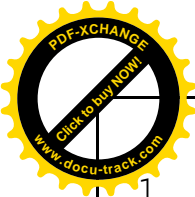


1 that that's been clearly established in the course of this
2 case.

3 Now, there's one decision I'd recommend to your
4 Honor that was decided after the briefing was complete. It's
5 County of Santa Clara, 224 Fed Supp 2nd, 292. I'm sorry
6 that's the wrong one. Well, I'll get you the cite in a
7 minute. It was a case decided in December by Judge Alsop in
8 the Northern District of California, and it was a case
9 brought by the County of Santa Clara alleging, in much the
10 same way as the states allege here, that the pharmaceutical
11 companies had overcharged them under something called the
12 340(b) program, which provides for sales of pharmaceuticals
13 to public health facilities. And there was no timeliness
14 issue there, but there's a very thorough discussion in that
15 case of the substantial federal question and this question of
16 whether there's going to be any upset of the division between
17 state and Federal Courts. And Judge Alsop says something
18 that's very, very relevant. He said there is no
19 Congressionally approved division of labor with respect to
20 these cases; they're regularly litigated in both the state
21 and the Federal Courts.

22 THE COURT: When you're dealing with Medicare.

23 MR. LYNCH: Medicare, right. And we are dealing
24 with Medicare in Kentucky, Illinois, and New York, so those
25 are Medicare claims.



1 THE COURT: Are there Medicaid claims as well?

2 MR. LYNCH: There are also Medicaid claims. But
3 it's also clear, also clear from your Honor's early opinion,
4 and particularly there's a Second Circuit case that we've
5 cited, Bruder, that all it takes is one federal question to
6 remove the case. There has to be a federal question; there
7 doesn't have to be all federal questions.

8 Let me explain why we -- the point that was made
9 about the New Jersey case, as you'll recall, you
10 initially --

11 THE COURT: Which one's the New Jersey case?

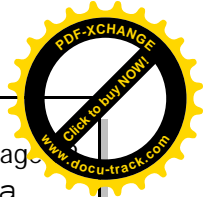
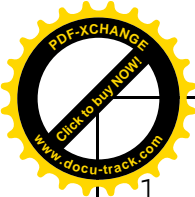
12 MR. LYNCH: Mr. Libman was saying that we removed
13 the New Jersey case after your decision, so why didn't we
14 remove these other cases?

15 THE COURT: Is that the Local --

16 MR. LYNCH: Yes, Local whatever, 65.

17 THE COURT: -- 68 case?

18 MR. LYNCH: 68. And the reason for that is, your
19 decision in Montana came down on June 11, 2003. The time for
20 removal of the Local 68 from New Jersey came in July 3,
21 2003. But as you'll recall, we filed a motion for
22 reconsideration from your decision, and you wrote an opinion
23 which you issued on August 20, 2003. So when the time came
24 for us to remove in July, we still had the hope that you
25 might reconsider your decision on Abbott, and that's why we



1 asserted the same grounds there that we had in the Montana
2 case.

3 THE COURT: But before we get into the very, in my
4 opinion, interesting question of the extent of Grable, you
5 have to get past paper or order. And what you're saying to
6 me is, what you'd like me to do is take Green and Red Cross
7 one step further?

8 MR. LYNCH: That's absolutely right, your Honor.
9 That's our submission.

10 THE COURT: All right, thank you very much.

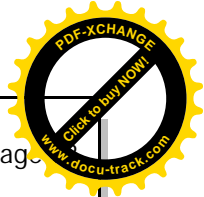
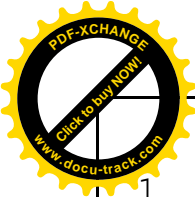
11 MR. LYNCH: Thank you, your Honor. Oh, the
12 Santa Clara, Judge, it's 401 Fed Supp 2nd, 1022.

13 THE COURT: So he's disagreeing with the judge who
14 wrote that very long decision from the Eastern District of
15 Pennsylvania?

16 MR. LYNCH: Yes.

17 THE COURT: Judge Sanchez?

18 MR. LYNCH: Judge Sanchez. One of the interesting
19 things is, Judge, the cases that have gone against us not
20 only disagree with your decision in Montana and Minnesota;
21 they disagree with each other. And one of the problems here
22 is, these judges made these decisions the first thing that
23 came up in the case. They didn't have the opportunity to
24 familiarize themselves with these programs the way you've
25 had, probably more than you'd like, but they were making



1 decisions about Medicare.

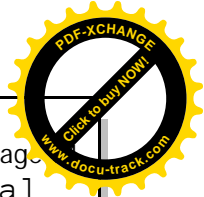
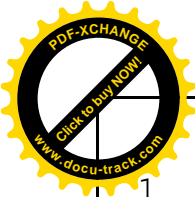
2 THE COURT: At every second I love this case.

3 (Laughter.)

4 MR. LYNCH: We do too, your Honor. We've had a
5 great time for four years. And Judge Sanchez said there's no
6 federal question at all, clearly inconsistent with you. Then
7 Judge Crabb in Wisconsin said, "Well, I disagree with
8 Judge Sanchez about that, but I'm going to remand because I
9 get into this Justice Souter, whether there's upset of the
10 balance between the state and Federal Courts." And then
11 Judge Alsop said, "No, well, Judge Crabb got it wrong." So
12 there's great contrariety here and --

13 THE COURT: Well, this piece of it is difficult,
14 and so that's what I have to get into, if I get beyond
15 whether it's a paper or an order. How does Wright & Miller
16 rule on it?

17 MR. LYNCH: Well, they don't get this particular.
18 They haven't dealt with this particular issue. They take
19 actually quite an expansive view of what "order" and "other
20 paper" is. And you asked about First Circuit cases. I'm
21 pretty certain there are no cases from the Court of Appeals,
22 but we have found a couple of District Court cases in the
23 First Circuit. One is Mill-Bern Associates, 69 Fed Supp 2nd,
24 240, Judge O'Toole here in Massachusetts, and Parker V.
25 County of Oxford, 224 Fed Supp 2nd, 292, Judge Carter in



1 Maine. And these cases are not directly on point. They deal
2 with --

3 THE COURT: They go against you, right?

4 MR. LYNCH: No, I don't think -- one does and one
5 doesn't, I think. There's a Connecticut case as well that
6 does go our way.

7 THE COURT: I love Connecticut, but we actually
8 moved that into the Second Circuit, so --

9 (Laughter.)

10 THE COURT: I've always wondered why, but --

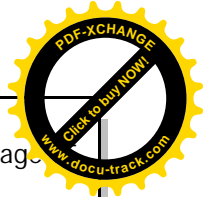
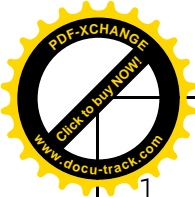
11 MR. LYNCH: Connecticut was originally in the First
12 Circuit.

13 These cases deal with whether an affidavit or a
14 deposition transcript, but they have some general language
15 about "order" or "other paper." But the key cases, frankly,
16 your Honor, our position rises and falls on your willingness
17 to take Green and Red Cross that one step further, which we
18 think is compelled by the logic of those cases.

19 THE COURT: Well, thank you very much. Did you
20 want to respond at all?

21 MR. LIBMAN: I'll do it from here. Briefly, your
22 Honor, on the issue of timeliness, the five courts that have
23 remanded, not all reach the timeliness question. All those
24 that did find it was untimely.

25 THE COURT: In these pharmaceutical kinds of cases?



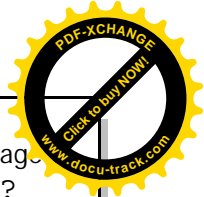
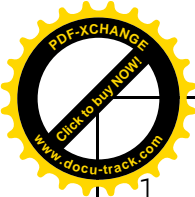
1 MR. LIBMAN: The precise same issues that removal
2 was sought, the basis for which removal was sought here as
3 well. They're unanimous. Alabama didn't say much about it.
4 I don't think they reached it. But the other cases are
5 Minnesota, Pennsylvania, Wisconsin, and Texas. They're
6 unanimous in terms of this timeliness question, and they
7 reject the argument that the defendants are asking you to
8 accept here.

9 The Green case, just very briefly, the Green case,
10 the intervening appellate court decision there found that the
11 federal law preempted state law as to these very same
12 defendants. So you have Red Cross that the Supreme Court
13 specifically said these cases could be removed, and in Green
14 it's a preemption issue, very different from the facts here.

15 And then, finally, the Santa Clara case -- I know
16 this speaks to Grable, but in the Santa Clara case, there was
17 a federal contract at issue that had to be interpreted in
18 accordance with federal common law, and that should inform
19 your judgment about whether that is analogous to this
20 situation here.

21 THE COURT: Thank you very much. All right, so
22 we're going to move on.

23 MS. HUNT: Your Honor, is it necessary for me to
24 just tell you one more reason why Grable is not
25 "other paper"?



1 THE COURT: Go for it. I forget, your name again?

2 MS. HUNT: Carol Hunt. I just wanted to bring it

3 to your Honor's attention that in New York, again, there's

4 another reason why Grable is not "other paper," and that's

5 because this is the second time that New York and New York

6 cases have been removed. You remanded these actions back in

7 2003, and Section 1447(d) of Title 28 states that "An order

8 remanding a case is not reviewable on appeal or otherwise."

9 And that's an absolute prohibition. And what defendants are

10 doing is essentially seeking a review of your previous remand

11 order, and in the removal papers, they said, "Judge Saris was

12 incorrect in light of this new law." And in fact what

13 they're doing is trying to go into the very same thing they

14 argued before. They're arguing federal claims raised --

15 THE COURT: But in fact I denied the motion for

16 reconsideration. I was quite convinced that the First

17 Circuit mandated a certain thing. However, it is true that

18 that line of analysis, what I'll call roughly the Seventh

19 Circuit line, was rejected.

20 MS. HUNT: But as you also pointed out, Grable

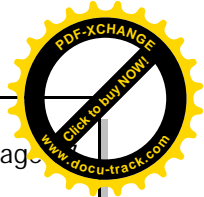
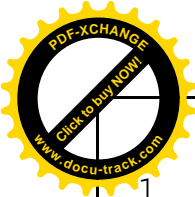
21 brings into this whole a nuanced interpretation beyond what

22 you decided. In fact, your decision could still hold in

23 light of the Grable analysis of the balancing between the

24 state and federal --

25 THE COURT: Right, and that's a far more



1 complicated problem.

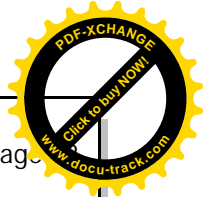
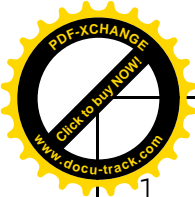
2 MS. HUNT: And that's the point, that Grable
3 expressly did not overrule any law, and that's why in fact
4 the defendants are just adding yet another opinion to their
5 argument that removal is appropriate, and they cannot do that
6 under 1447(d).

7 The "other paper" cases that involved two removals
8 all found not only that an opinion, a subsequent court
9 opinion was not "other paper," but they also said, "Well, you
10 can't do this anyway under 1447(d)." Morsani said it's an
11 irony, the defendants are arguing that they were asking to
12 review an unreviewable order. It's regardless -- regardless
13 of whether the court was right or wrong in their previous
14 decision. Combs says the same thing, that remand is
15 appropriate for a second reason, in that the decision was
16 unreviewable.

17 THE COURT: Thank you very much.

18 MS. HUNT: Thank you.

19 MR. LYNCH: Your Honor, could I just speak to that
20 point briefly? If Ms. Hunt were correct, then the cases in
21 Red Cross and Green could not have been removed the second
22 time. And in fact there's a discussion of this very point
23 within the Red Cross, the Third Circuit decision. It's not a
24 re-removal, and if New York's position were correct, those
25 cases would have been stuck and couldn't have been



1 re-removed.

2 THE COURT: Thank you very much. All right, now
3 we're going to move on to part two, so. . .

4 MS. BENEDETTO: Local 68, your Honor.

5 THE COURT: You're Local 68, all right. And your
6 name again is?

7 MS. BENEDETTO: I'm Terry Benedetto.

8 THE COURT: All right, Ms. Benedetto, and you
9 represent the local?

10 MS. BENEDETTO: Yes, your Honor. This is the
11 local's motion for remand, which this case has been around a
12 while. The remand was filed back in June of '03, and I'm
13 sure your Honor has, I think, four rounds of briefing on this
14 remand.

15 THE COURT: What are the underlying claims? Are
16 they all under state law?

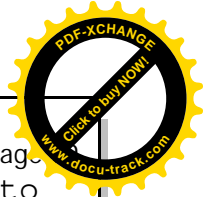
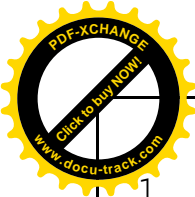
17 MS. BENEDETTO: Yes, your Honor.

18 THE COURT: So this is a diversity case?

19 MS. BENEDETTO: Well, your Honor, they basically --

20 THE COURT: You're claiming -- all right, go ahead.

21 MS. BENEDETTO: They removed the case based on
22 ERISA and Medicare preemption. And we claim that before you
23 even get to the substantive basis of removal, you have to
24 satisfy the procedural bases for removal, which they didn't
25 have unanimity of consent.



1 Basically there are three key points that I want to
2 touch on. The first is that the plaintiff has viable claims
3 against these doctor defendants.

4 THE COURT: All right, help me. How many doctor
5 defendants are there?

6 MS. BENEDETTO: There are three. There's Antoun,
7 Hopkins, and Berkman, New Jersey, Florida, and Ohio
8 respectively. And these doctors pled guilty to federal
9 criminal charges respecting a conspiracy to bill for free
10 samples of AstraZeneca's drug Zoladex.

11 THE COURT: Did they sell to the Local 68?

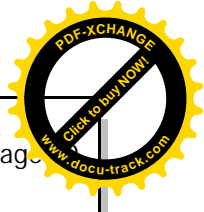
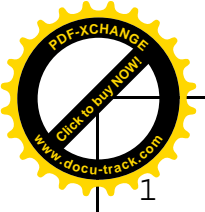
12 MS. BENEDETTO: Well, it's also a class case, your
13 Honor, Local 68 on behalf of an alleged purported nationwide
14 class. And certainly Local 68 --

15 THE COURT: Would Local 68 have standing against
16 the doctors?

17 MS. BENEDETTO: Yes, your Honor. One of the
18 doctors is in New Jersey, Dr. Antoun, and in the same area as
19 Local 68's base of employees.

20 THE COURT: So you have evidence that some of your
21 employees bought these pills, or whatever it was, from
22 Antoun?

23 MS. BENEDETTO: We know that he is in the area of
24 our employees and certainly many of whom bought Zoladex. We
25 also represent a class, nationwide class, respecting



1 purchasers of Zoladex and the other drugs that these
2 defendant pharmaceuticals companies manufacture.

3 And my second point is that the doctor defendants
4 don't want to be in Federal Court either. They filed their
5 own motion for remand based on Section 1448, and those
6 motions were filed back in July of 2003 and August of 2003,
7 their motions for remand under the defendants' right to file
8 for remand under Section 1448.

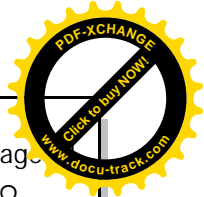
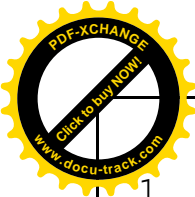
9 And my third major point is that this Court's
10 decision in Mills, which is cited in the briefing
11 extensively, governs. And that requires that in an analysis
12 of fraudulent joinder, an objective standard is used. And
13 clearly this circles back to my first point, that plaintiffs
14 have objectively a viable claim against these defendants who
15 pled guilty to federal criminal charges. And therefore the
16 defendant AstraZeneca shouldn't be entitled to discovery or
17 to get into the subjective settlement negotiations, if any
18 took place, of the plaintiffs and the doctor defendants.

19 THE COURT: Well, it plays out in different ways.
20 I mean, did any of these doctors -- well, did all of these
21 doctors settle?

22 MS. BENEDETTO: With the federal government.

23 THE COURT: No, but with you?

24 MS. BENEDETTO: No, your Honor. The negotiations
25 were stalled.



1 THE COURT: So have you settled with -- prior to
2 adding them, did you settle with any of these?

3 MS. BENEDETTO: No, your Honor.

4 THE COURT: Have you since settled with any of
5 them?

6 MS. BENEDETTO: No, your Honor.

7 THE COURT: There are no settlement agreements?

8 MS. BENEDETTO: That's correct. Well, AstraZeneca
9 was able to obtain from one of the counsel for one of the
10 doctor defendants, there was a memorandum of understanding
11 that was never executed, and AstraZeneca has set that
12 memorandum of understanding in its papers before the Court.

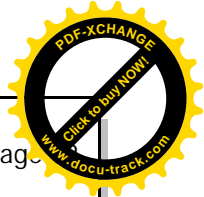
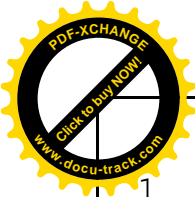
13 THE COURT: Were there any oral -- in other words,
14 here's the problem --

15 MS. BENEDETTO: There was no quid pro quo.

16 THE COURT: Have there been depositions -- I
17 haven't been able to figure out how far this has gone in
18 discovery. Has there been discovery with respect to any of
19 these doctors?

20 MS. BENEDETTO: Your Honor, the defendant
21 AstraZeneca's counsel was at the depositions taken in this
22 case. Not related to Local 68 but in MDL 1456, each one of
23 these doctors were deposed. They were deposed before your
24 Honor even ordered --

25 THE COURT: About the settlement, about the



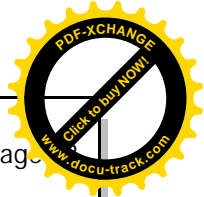
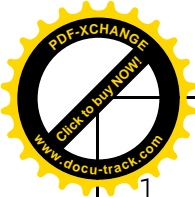
1 discussions?

2 MS. BENEDETTO: Well, they had already asked for
3 discovery in that regard, and they had the opportunity to
4 take these doctors' depositions. Our position is that the
5 only thing that they should be discovering from these doctors
6 is whether or not in fact Local 68 has a viable claim against
7 the doctors.

8 THE COURT: Well, I see it differently actually,
9 and that's why I was a little annoyed that the discovery
10 isn't complete now because this is just taking too long. It
11 strikes me, if you have a viable claim against these doctors
12 and you settle it in cooperation, almost like a criminal
13 case, for want of a better word -- you know, viable case,
14 reasonable basis in fact and law -- and you know they're not
15 the deep pockets, and they agree to provide documents and
16 otherwise testify for you, I'm not sure that's a violation of
17 any law. But if you've settled the whole thing up before
18 suit and you add them, and then you bring the suit only for
19 purposes of them refusing to consent, I might have a problem
20 with that. And so chronology is everything.

21 MS. BENEDETTO: Your Honor, there are no
22 settlements with any of these doctors.

23 THE COURT: But here's my problem: It's your
24 say-so. And so that's why I authorized discovery. And I got
25 some objection from Dr. Hopkins' lawyer, who asked not to be



1 here, which is fine. But, you know, Judge Bowler said,
2 "Provide the information," and it didn't happen. So I'm
3 just trying to figure out, how far did it go in discovery?

4 MS. BENEDETTO: There was significant amount of
5 discovery produced.

6 THE COURT: I just want to know.

7 MS. BENEDETTO: Dr. Hopkins produced -- was up to
8 Bates No. 500 and something pages' worth of E-mails back and
9 forth between himself and the lawyers from my firm, and,
10 frankly, the lawyers from the defense firms. And
11 Mr. Mustakoff, who was counsel for Dr. Antoun, actually
12 produced the memorandum of understanding that was being
13 negotiated, but there was never a final agreement reached.

14 THE COURT: And what was the third doctor?

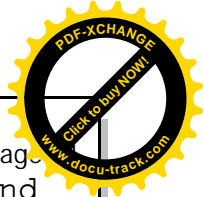
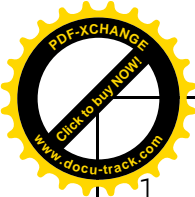
15 MS. BENEDETTO: Berkman.

16 THE COURT: Yes, and what happened with him?

17 MS. BENEDETTO: His counsel produced an affidavit
18 which satisfied the defendants. The defendants didn't pursue
19 any further. And I think he produced, like, seven pages'
20 worth of documents.

21 THE COURT: Well, what hasn't been produced? In
22 other words, did the defendants request depositions and
23 people refused to do it?

24 MS. BENEDETTO: The only thing outstanding, your
25 Honor -- I believe the defendants are satisfied with what



1 they've received from Dr. Berkman's counsel, Mr. Sherman, and
2 I believe they're satisfied with what they received from
3 Dr. Antoun's counsel, Mr. Mustakoff. What they are still
4 pursuing ostensibly is the settlement negotiations documents
5 from Dr. Hopkins' counsel, which is Mr. Fernandez.

6 THE COURT: Well, do you have them? Do you have
7 the settlement papers with Hopkins?

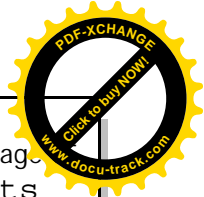
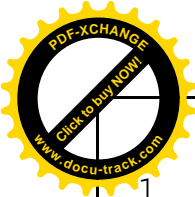
8 MS. BENEDETTO: Your Honor, obviously there were
9 settlement negotiations with Dr. Hopkins. It's listed on his
10 privilege log as the basis for why he was not turning over
11 those E-mails back and forth.

12 THE COURT: But they're not privileged. I mean,
13 they are if they're between him and his counsel, but not if
14 they're between you and the counsel, or whoever is
15 representing the local.

16 MS. BENEDETTO: Your Honor, our point in all of
17 this is, if we're having settlement discussions with -- for
18 example, if we're having settlement discussions with
19 AstraZeneca, is GlaxoSmithKline entitled to find out about
20 that? I mean, it could open up a whole can of worms.

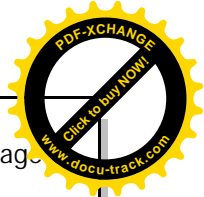
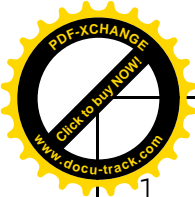
21 THE COURT: It depends, it depends. You know,
22 everything is "It depends." So I'm happy to put it under a
23 protective order, but I just have to be content in my heart
24 there was no collusion.

25 MS. BENEDETTO: And I think the point of the matter



1 is that as differing from the other cases that the defendants
2 cite, such as in the Fen-Phen case that they cite from the
3 Eastern District, the lawyer for the plaintiff said that
4 there was such a quid pro quo agreement, "If you agree to
5 object to removal, we'll settle with you," the phentermine
6 defendants. But there was also an added aspect there. In
7 that case, there was clearly no way that the plaintiffs could
8 make out a cause of action against the phentermine defendants
9 as opposed to the Pondimin and Redux defendants. Here we
10 have defendants who pled guilty to the cause of action that
11 we're alleging.

12 THE COURT: I agree, but there's at least a
13 question about standing, and that's what I'm sort of stuck
14 on. Now, I've also got a problem with that because there was
15 a misrepresentation in the removal papers, so I'm not sure
16 which trumps which. But I think that you're quite right,
17 that if there's a reasonable basis in fact and law, and then
18 you settled it for purposes of discovery or to cooperate as
19 witnesses or whatever, I'm not sure that violates anything.
20 What would worry me is if there was an agreement, verbally or
21 in E-mail form, and you simply sued them anyway so they
22 wouldn't consent. I'm assuming for a minute that that's not
23 going to prove up, but that's why I ordered discovery. And
24 one of the reasons I'm a little annoyed is, I had hoped this
25 would all be done by now so we could stop the skirmishing and



1 I could just rule.

2 MS. BENEDETTO: Your Honor, I'm here today to tell
3 you and Mr. Haviland is here today to tell you that there are
4 no such settlement agreements.

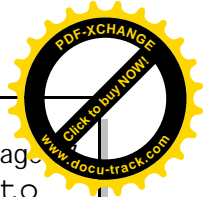
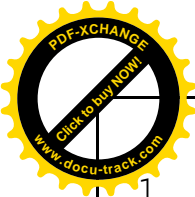
5 THE COURT: I know, but that's why we have
6 discovery, so someone says it under oath, you know? That's
7 the thing. Now, if you want to put it -- I don't know,
8 counsel usually don't like putting things under oath, but,
9 you know, if somebody who was involved wants to put it under
10 oath, "There was no discussion about it, no agreement about
11 it," whatever, it would go a long way.

12 MR. HAVILAND: Your Honor, I'm Don Haviland for the
13 local plaintiffs, and I'll put under oath that there was no
14 discussion with any of these doctors' counsel as a quid pro
15 quo that "If you refuse your consent to removal, we will
16 settle with you." I'll tell you exactly what happened.

17 THE COURT: But did you discuss consent to removal
18 at all? Did it come up?

19 MR. HAVILAND: Not prior to removal, Judge, not
20 prior to the removal. The removal came. The discussion was
21 raised, as it was with the defense counsel, about whether
22 they would consent.

23 THE COURT: But I guess they remove, and then
24 there's a question of -- well, you know, I don't want to do
25 this here. At some point, if you want to put in affidavit



1 form the chronology and exactly what happened with respect to
2 consent, both of you, and then you get counsel from the other
3 side to do it, that may be enough for me. But what I don't
4 like is, I ordered it, and it hasn't happened. And then
5 Judge Bowler ordered it again and I've got some objection.
6 It should be pretty simple. It should just be easy.

7 MR. HAVILAND: The objection we had, your Honor, as
8 plaintiffs' counsel is, when you have post-litigation
9 communications amongst plaintiffs' counsel and with defense
10 counsel about settlement, we have our work product, our
11 internal notes, we've got internal communications. And we
12 were asked by AstraZeneca's counsel, respectfully, to log
13 everything.

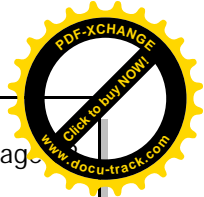
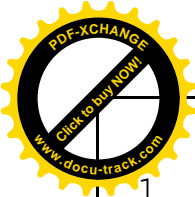
14 THE COURT: You can't -- then fine, assert the
15 privilege. I'm only talking about documents between you and
16 the doctors.

17 MR. HAVILAND: And I believe they have everything,
18 your Honor. I don't believe the defendant has withheld --

19 THE COURT: Well, somebody wrote me a -- is
20 objecting to Judge Bowler's order.

21 MR. HAVILAND: I know Dr. Hopkins has taken a
22 strong line on that. I know that. I don't know about the
23 case of Dr. Antoun.

24 THE COURT: I'm about to overrule that, but I just
25 want it to all happen soon so I can just rule.



1 MR. HAVILAND: Your Honor, we're asking to put it
2 in affidavit form.

3 THE COURT: Let me just assume for a second you get
4 past this hurdle. Okay, let's just address the merits for a
5 minute. Now, let's assume I find that there was a
6 misrepresentation in the removal papers, all right, that they
7 actually consented. So now what do I -- and let's assume for
8 a minute, however, that their point is well-taken that, in
9 any event, it wasn't material because they hadn't been
10 properly served it. What do I do with that fact pattern?

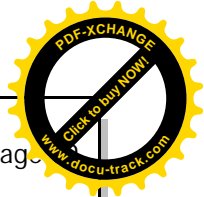
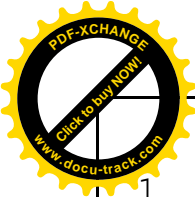
11 MS. BENEDETTO: Your Honor, I think under the New
12 Jersey rules -- and I've been a member of the New Jersey bar
13 for fifteen years -- if a defense counsel accepts service on
14 your behalf, they've accepted service. These doctors'
15 counsel have said that they -- particularly if you look at
16 Dr. Antoun, he accepted service on July 1. The case was
17 removed on July 3. And they point to Rule 4:4-4(c).

18 THE COURT: Okay, this is helpful. So they say it
19 was removed on the 3rd, and then they accepted service on --

20 MS. BENEDETTO: The 1st, two days before,
21 Dr. Antoun's counsel.

22 THE COURT: There was one little squirmish about
23 whether they signed something. Did they?

24 MS. BENEDETTO: No. There's no requirement that
25 they have to. What the rule says, 4:4-4(c), is that a



1 plaintiff's attorney could not take default against a
2 defendant who had accepted mail service until such time as
3 that defendant appeared or answered.

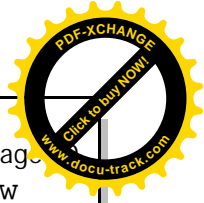
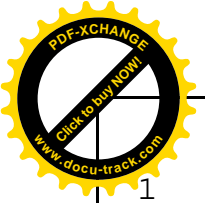
4 THE COURT: So there's no requirement.

5 MS. BENEDETTO: We wouldn't be able to take a
6 default against Dr. Antoun by virtue of the fact that his
7 counsel agreed to accept service on his behalf on July 1.
8 There's nothing in the rule that says, by virtue of the fact
9 that Dr. Antoun's counsel didn't appear in the case until he
10 filed his joinder in the remand on July 18, that does not
11 mean that the effective date of service then becomes July the
12 18th. That's not what the rule says.

13 THE COURT: So just to play it out, so let's assume
14 he accepts service on the 1st. You say that was enough to be
15 valid service, and that the argument about when it went into
16 effect doesn't defeat the validity of service? Is that
17 right?

18 MS. BENEDETTO: Well, the way the rule is worded
19 does not deem that the effective date of service changes to
20 the date on which the defense counsel appears. So the only
21 thing that that rule goes to is the default issue. The rule
22 goes to the issue of plaintiff's counsel can't serve by mail
23 a counsel or a defendant and then take a default against them
24 before that counsel has appeared in the case.

25 THE COURT: Is there a case or a New Jersey



1 practice that talks about the effect of that rule? You know
2 how we have Mass. Practice here, you know, and it tells you
3 how to serve, et cetera.

4 MS. BENEDETTO: I did research, your Honor. I
5 couldn't find it. I do know there's cases out there that
6 talk about, you know, defense counsel accepting service.
7 It's certainly anticipated and it's certainly done in
8 practice in New Jersey.

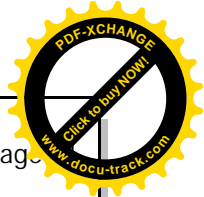
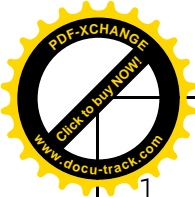
9 THE COURT: So you don't have a practice series
10 from New Jersey that you know of?

11 MS. BENEDETTO: I didn't look at -- I did research
12 on Westlaw for that. I didn't look at the practice series.

13 THE COURT: If you see something, that would be
14 very useful, because I know we have a very practical treatise
15 on what it all means and plays out under state law, and
16 sometimes a district court, you know, lower court opinions in
17 the state court, and it would be very useful to have that.

18 So assume for a minute it was effective service.
19 You're saying that they didn't consent, and they would have
20 objected? Is that it?

21 MS. BENEDETTO: Well, counsel for the defendants
22 stated that they tried to contact Mr. Mustakoff, who's
23 Dr. Antoun's counsel, a doctor in New Jersey, and he was on
24 trial, they didn't contact him. Yet they still put in their
25 removal papers that "We believe we're the only served



1 defendant," even though AstraZeneca and Dr. Antoun were
2 subject to the motion for our preliminary restraints that we
3 filed and both of them have indicated on the certificate of
4 service were served via overnight mail, Federal Express. So
5 Dr. Antoun got service the same way AstraZeneca did. So if
6 there's anything wrong with Dr. Antoun's service, then
7 AstraZeneca is basically saying, "It's okay the way you
8 served us, but it's not okay the way that you served
9 Dr. Antoun." So, I mean, they used the service upon them on
10 July 1 as a basis, you know, to remove the case.

11 THE COURT: Okay, thank you.

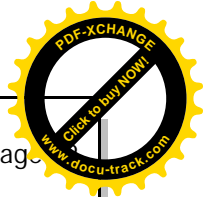
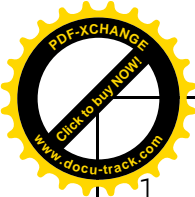
12 MS. BENEDETTO: And if I could just make one more
13 point, your Honor. Just with respect to this discovery, this
14 did not come to a head -- I mean, we even filed a 16.1
15 statement with your Honor back in April, and the defendants
16 never raised at that point in time that they wanted to have a
17 discovery schedule.

18 THE COURT: Didn't I put it in my last order?

19 MS. BENEDETTO: Yes, your Honor, but, I mean, they
20 waited to press it until this last round of briefing. And, I
21 mean, they have been arguing fraudulent joinder all along,
22 and it's only --

23 THE COURT: Did they give notices of deposition for
24 these people?

25 MS. BENEDETTO: They did originally, yes, your



1 Honor, back in July of 2003, and then they abandoned them.

2 THE COURT: I issued my order a lot more recently
3 than that.

4 MS. BENEDETTO: Correct, correct.

5 THE COURT: It certainly wasn't 2003, right? It
6 was just within the last six months, right?

7 MS. BENEDETTO: Yes, your Honor.

8 THE COURT: Did they renotice the depositions?

9 MS. BENEDETTO: They did, they did. And then, as
10 to Dr. Antoun's lawyer and as to Dr. Hopkins' lawyer, they
11 accepted the affidavits and the documents they produced, and
12 then did not pursue the depositions.

13 THE COURT: All right, well, I'll ask them what it
14 is that they think they don't have.

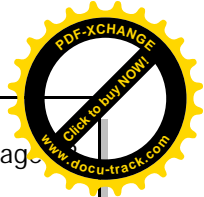
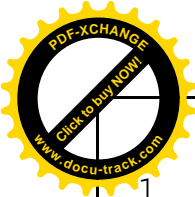
15 MS. BENEDETTO: Thank you, your Honor.

16 THE COURT: Thank you.

17 MR. FLYNN: Good afternoon, your Honor. Michael
18 Flynn from Davis Polk. A number of things have been said
19 which I'll clarify.

20 THE COURT: Can I just start off by saying, look, I
21 had a real problem with the statement made in the removal
22 petition. It was just wrong.

23 MR. FLYNN: I think our statement, your Honor, was
24 twofold. First of all, as we said initially, we believe that
25 under New Jersey service rules, that none of the doctor



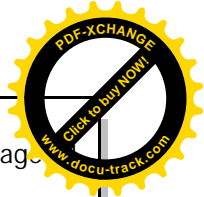
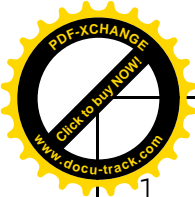
1 defendants --

2 THE COURT: Then you should have just said that.

3 MR. FLYNN: We did, and, your Honor, the first
4 statement in the removal petition says, "We believe no doctor
5 defendant has been served." In the second statement, we went
6 above and beyond that because at the time we had no belief,
7 your Honor, that these doctor defendants would not consent to
8 removal. And here's the basis for --

9 THE COURT: You know what, I just was pretty upset
10 when I read it because I just thought that -- now, it could
11 have been negligence rather than an intentional
12 misrepresentation -- it way overstated what it was.

13 MR. FLYNN: I can explain to your Honor in good
14 faith why we believe that, and if there's any confusion about
15 the language chosen, we obviously did not mean anything
16 intentional by that language. But let me tell you the basis
17 on which we believe that the doctor defendants would
18 consent. An associate in our office called counsel for two
19 of the doctors on the day the removal petition was filed,
20 indicated to them that we intended to remove, asked them, had
21 they been properly served? The answer to that was "no."
22 In both instances, they did not believe they had been
23 properly served, so we did not believe we needed their
24 consent. But having raised the issue of our removal, neither
25 of them objected.



1 THE COURT: Yes, but then you should have said,
2 "Having raised the issue, neither objected." That's
3 different than they consented. You never asked the question,
4 "Do you consent?"

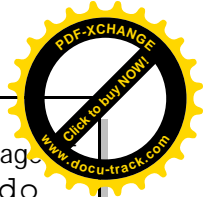
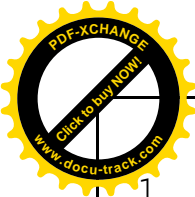
5 MR. FLYNN: And I agree, your Honor, we did not ask
6 that question because our belief was that we did not need
7 their consent. And I don't believe the removal --

8 THE COURT: Then you should have said that in the
9 removal petition. It overstated your case.

10 MR. FLYNN: And I think it was, again, your Honor,
11 it was above and beyond what we thought was necessary.

12 The other reason is, your Honor, which really
13 informed our belief about whether or not the doctor
14 defendants would consent, is that we had every reason to
15 believe, until they started to file papers in opposition to
16 remand, that they would want to be in the MDL proceedings.
17 Under your Case Management Order No. 2, your Honor, their
18 case, subsequently transferred class action, would be
19 subsumed in the AMCC --

20 THE COURT: Well, then you say that, you say that.
21 It looked when I read it as if they consented, they said to
22 you, "We agree." That's the way it is usually when all these
23 pharmaceutical companies are called -- I'm hoping that that's
24 true -- that somebody from the firm actually says, "We
25 consent."



1 It overstated the case, and I'm not sure what to do
2 with that. I mean, I sort of half expected someone to come
3 in and say, "Yes, I'm the partner who signed off on that
4 thing, and I just misunderstood what my associate said, and
5 I'm sorry." But instead I get a justification for it.

6 MR. FLYNN: Well, I think, your Honor -- and
7 Mr. Wise's affidavit in response to your order I think
8 explains and no need for me to continue to reiterate it. I
9 understand, and I apologize for any confusion on that point,
10 but we really did believe, your Honor, for several reasons
11 that the doctors would be amenable to being in this court
12 because they would be subsumed in a case where they were not
13 a defendant, and we had no reason to believe that they would
14 want to stay in New Jersey state court.

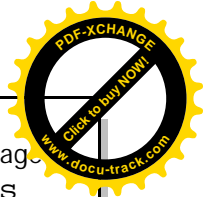
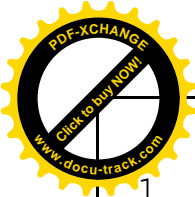
15 Let me address, your Honor, unless you have other
16 questions --

17 THE COURT: Well, let me ask you this: Suppose I
18 find that there was a material misrepresentation in the
19 removal petition. What do I do with that?

20 MR. FLYNN: If you find that, your Honor, again,
21 it's not, in our view -- and I'll get to this in a minute --
22 we believe it has nothing to do with the remand issue.

23 THE COURT: Well, that's what I'm asking you.

24 MR. FLYNN: Yes, but because the remand issue, your
25 Honor, we believe, with respect to the procedural defect,



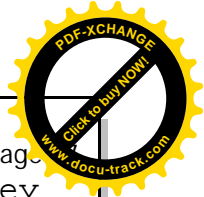
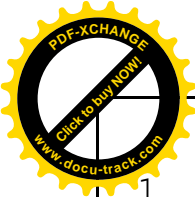
1 rises or falls completely on the issue of whether or not, as
2 you pointed out before, whether or not the doctor defendants
3 have been properly served under New Jersey law at the time
4 the removal petition was filed. And I have with me, your
5 Honor, cocounsel from New Jersey who can speak to the New
6 Jersey service rules. And so to answer --

7 THE COURT: Can I just say, I did not hear that
8 cell phone, but if I had, there's a \$250 fine in Federal
9 Court for it. So I didn't hear it, but I don't want to hear
10 it again, all right? Some judges are pretty strict on it,
11 but I have the one-ring rule, so, hopefully, if somebody
12 turns it off and I haven't seen whom.

13 All right, go ahead.

14 MR. FLYNN: So we believe, your Honor, that it has
15 no material effect on the remand and the removal notice here
16 because we believe that consent was irrelevant because of the
17 service issue. So if you find that there was a material
18 misrepresentation on the issue of consent, we believe it has
19 no effect on the remand issue at all because we believe that
20 the doctor defendants' consent was not required because they
21 had not been served.

22 THE COURT: All right. So now let's get to part
23 two. I found this very, you know, like a law exam question
24 here. So let's assume for a minute that there's a little mud
25 on the defendants. Now let's assume for a minute that there



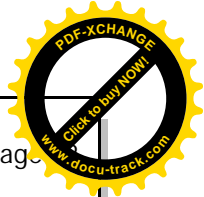
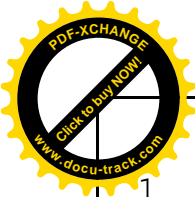
1 was an agreement between plaintiffs and the doctors that they
2 would settle with them in exchange for production of
3 documents and cooperative testimony. What's wrong with
4 that?

5 MR. FLYNN: The only thing that's wrong with it,
6 your Honor, is if they were joined in order to defeat
7 removal.

8 THE COURT: All right, fair enough, okay, because
9 you throw a lot out about how this was just about -- you
10 know, it wasn't about really suing them; they were suing them
11 in order to get cooperation. I couldn't think of a reason
12 why that was wrong.

13 MR. FLYNN: Well, that in and of itself, your
14 Honor, might not be wrong, but when it's coupled in a
15 circumstance where we believe there's significant indicia
16 that there's no intent on the plaintiff here to pursue a
17 claim against these doctor defendants to join judgment, we
18 think that satisfies the fraudulent joinder. And, again, we
19 don't think you need to reach it because of the issue of
20 service, and their consent is not required.

21 But we do think there's a lot of indicia here of
22 discussions. Before your Honor, counsel for plaintiff
23 indicated that they had no discussions with the doctors. The
24 discovery we've been able to take so far, your Honor,
25 indicates the following things: We have an affidavit from



1 one of the doctor's lawyers who says in his affidavit
2 undisputed that counsel for the plaintiffs indicated at the
3 time the service issue was arising, the removal issue was
4 arising in early July, 2003, that "We are not interested in
5 your client as a defendant, only as a fact witness. And it
6 is in your best interest," meaning the doctor defendant --
7 this is Dr. Berkman from Ohio -- "for the case to remain in
8 New Jersey state court."

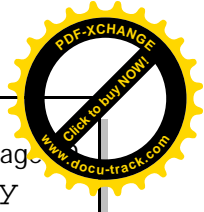
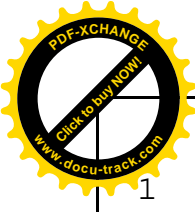
9 We have prior to the complaint --

10 THE COURT: So let me just ask. So with Berkman,
11 are you content with the discovery at this point?

12 MR. FLYNN: Yes.

13 THE COURT: All right, so Berkman is complete. All
14 right, now move on to the next one.

15 MR. FLYNN: The next one, your Honor, is of
16 Dr. Antoun in New Jersey. Several pieces of evidence, your
17 Honor, we believe indicates that the plaintiff had no
18 intention to pursue a joint judgment with respect to
19 Dr. Antoun. Number one, your Honor, Dr. Antoun was also part
20 of a preliminary injunction that the plaintiff filed against
21 AstraZeneca and the individual doctors, and it was hotly
22 contested in the New Jersey courts before removal was --
23 before a decision was made. And Dr. Antoun never answered,
24 never appeared, and they never pursued that injunctive relief
25 against him. There is no --



1 THE COURT: What do you want in terms of discovery
2 against Antoun, anything?

3 MR. FLYNN: No. Dr. Antoun, we have an affidavit
4 from his attorney, Mr. Mustakoff, which we believe
5 establishes that under New Jersey service rules, service was
6 not effected, and so therefore Dr. Antoun's consent was not
7 required.

8 THE COURT: So you don't want any more discovery on
9 Mr. --

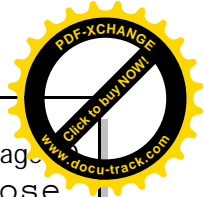
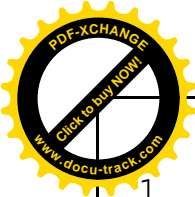
10 MR. FLYNN: No, no. We've got a draft MOU,
11 memorandum of understanding, circulated to Dr. Antoun's
12 counsel before the complaint was even filed. We also have,
13 your Honor --

14 THE COURT: Wait a minute. Does it discuss
15 consent, and in exchange you've got to consent?

16 MR. FLYNN: No, it does not, your Honor.

17 THE COURT: So who's the last one?

18 MR. FLYNN: The last one is Dr. Hopkins,
19 Mr. Fernandez. You have his papers, your Honor. And your
20 Honor is correct that Mr. Fernandez moved for a protective
21 order. After your order issued in August, we issued
22 discovery notices pursuant to that order, and Mr. Fernandez
23 moved for a protective order. We opposed. Judge Bowler
24 agreed with us, as your Honor has already indicated.
25 Notwithstanding that, Dr. Hopkins and his attorney have filed



1 objections, and we have opposed those, your Honor, and those
2 are now before you.

3 The privilege log, your Honor, that Mr. Fernandez
4 produced indicates that he is withholding documents, E-mail
5 correspondence with plaintiff's counsel in the early July,
6 2003 time period relating to discussions regarding
7 settlement. And this is at the very time, your Honor --

8 THE COURT: Sure, I understand that. So what you
9 want from him is what, just these documents?

10 MR. FLYNN: And also we've noticed his deposition,
11 and he's refused.

12 THE COURT: And did you notice it in a timely way,
13 within three months?

14 MR. FLYNN: Yes. Yes, we did, your Honor.

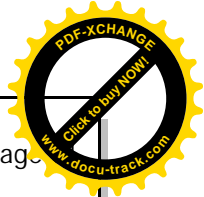
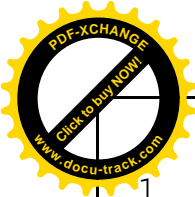
15 THE COURT: So you just want a deposition with the
16 lawyer?

17 MR. FLYNN: With the lawyer. We've noticed his
18 deposition, unless, as we've done with the other doctors --
19 we're not trying to be unreasonable here -- to the extent
20 that doctors are willing to put in affidavits, we're not
21 looking to drag people through unnecessary discovery.

22 THE COURT: So whom did you notice?

23 MR. FLYNN: We noticed Dr. Antoun's lawyer,
24 Mr. Mustakoff.

25 THE COURT: No, no, no, no. Whom did you notice



1 that you want now?

2 MR. FLYNN: Now the only person who is left is
3 Mr. Fernandez.

4 THE COURT: All right.

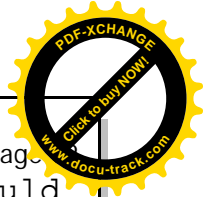
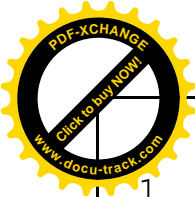
5 MR. FLYNN: Let me go through, your Honor, a couple
6 of other indicia.

7 THE COURT: So how long would it take to do his
8 deposition and get those documents, two weeks?

9 MR. FLYNN: I assume so, your Honor, yes, that
10 would be fine. If he produces the documents to us, we'd be
11 ready to go as soon as your Honor wanted us to.

12 THE COURT: He didn't want to show today, so I'm
13 going to do that on the papers, but I'll do that as soon as I
14 can.

15 MR. FLYNN: Okay. A couple of other points, your
16 Honor, just because I think this issue of fraudulent joinder
17 is important. You raised the issue before, your Honor, in
18 questions to counsel about standing and about the face of the
19 complaint, which were other reasons why we believed, your
20 Honor, that there's no intent here to pursue a joint judgment
21 against these doctor defendants. There is no allegation in
22 the complaint that the plaintiff was prescribed our client's
23 drug Zoladex at all, that plaintiff ever paid for Zoladex,
24 not one single allegation. There are no personal
25 jurisdiction allegations against the two out-of-state

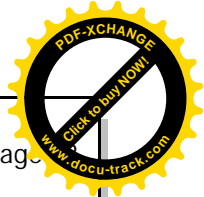
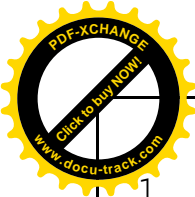


1 doctors, not a single allegation in the complaint that would
2 suggest that there is any claim to be pursued.

3 They make a lot of noise about the fact that these
4 doctor defendants pled guilty to crimes in a conspiracy with
5 our client. Those relate to totally different issues not at
6 issue in the AWP case. Those relate to free samples, and
7 it's not something that is a claim that they have asserted
8 any right to bring to seek relief on. So there's nothing on
9 the face of the complaint, your Honor, that we believe
10 suggests that there are real claims here.

11 THE COURT: Well, suppose I have both. This is
12 what I have been struggling with with my law clerks: I have
13 what I consider a material misrepresentation and removal
14 petition and a question about whether there's a reasonable
15 basis for standing against these doctors, or jurisdiction,
16 whatever you want. I don't think there's a problem that you
17 just -- suing them in order for their testimony. I don't
18 think there's case law that says that. So what do I do with
19 that?

20 MR. FLYNN: Well, your Honor, a couple of things.
21 Let's be clear here that something that they don't want to
22 talk about at all is, there's clearly federal jurisdiction
23 here, ERISA, complete preemption. Under your California
24 decision, all three prongs are met. They don't even
25 seriously contest that.



1 THE COURT: The issue is consent and --

2 MR. FLYNN: Well, no. The issue is consent on the
3 procedural defect. We think that, again to reiterate, the
4 consent issue need not be reached because the doctors weren't
5 served, and if your Honor would like --

6 THE COURT: Did you find a New Jersey practice
7 series?

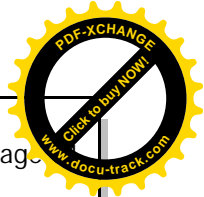
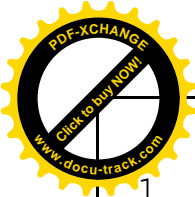
8 MR. FLYNN: I can turn it over to my colleague,
9 Mr. Cooner, to talk about the New Jersey service rules, which
10 I believe are clear, your Honor, that the effective date of
11 service has to be an initial appearance. Think of a
12 situation, your Honor -- and Mr. Cooner pointed this out to
13 me before -- think of a situation where someone says, "I'll
14 agree to accept service on July 1." On August 20 they make
15 their first appearance. If the July 1 date is the effective
16 date, when they make their first appearance, they are already
17 in default. It makes no sense, your Honor, and --

18 THE COURT: That's what she was saying, which is
19 you can't default someone for that.

20 MR. FLYNN: Well, they've cited no basis for that,
21 your Honor. And I think Mr. Cooner can explain to you --

22 THE COURT: Do you have a New Jersey practice
23 section? You must have like a New Jersey practice series,
24 right?

25 MR. COONER: There is a New Jersey practice series,



1 and more than that, the bible of New Jersey practice is
2 Pressler's handbook, Judge Pressler, Sylvia Pressler.

3 THE COURT: Do you have the Pressler handbook for
4 me?

5 MR. COONER: I have the sections of it as it
6 relates to this issue, and I can let you know that --

7 THE COURT: I'd love it.

8 MR. COONER: -- as to the specific issue that
9 you're raising, it is silent on it.

10 THE COURT: Of course.

11 (Laughter.)

12 THE COURT: Okay, but is this the only treatise on
13 point?

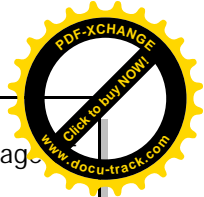
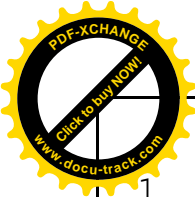
14 MR. COONER: No. There's a broader New Jersey
15 practice series that covers a whole series of different
16 topics, one of which is civil practice and procedure. I
17 believe the author of that book is Del Deo.

18 THE COURT: Okay, well --

19 MR. COONER: Affectionately known as the
20 "Red Books."

21 THE COURT: What I'd appreciate is if there is --
22 on that rule about attorney acceptance of service, if there
23 are sections on it from either side, I'd appreciate it. It's
24 not crystal clear what it all means when you read it.

25 MR. FLYNN: I just point out, your Honor, in our



1 briefs, it's not New Jersey practice itself, but we do cite
2 practice series that make it abundantly clear that the
3 effective date for service does not relate back to an oral
4 agreement to accept service. And that's in our papers.

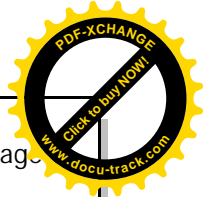
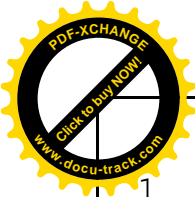
5 MR. COONER: And that's the cornerstone of what
6 we've tried to say, your Honor, is not just merely service,
7 but does service become effective? If you step back a little
8 bit, consent is only required from properly served
9 defendants. And you spoke earlier today about the
10 chronology, and in this case, the chronology is that
11 snapshot, and the snapshot is on July 3, 2003. And on that
12 day, there are three different ways you can effect service in
13 New Jersey, and they're all in the Rule 4:4-4. There's an
14 (a), a (b), and a (c). (a) is the primary way that you
15 effect service. It's delivery to the person. It is sheriff
16 service.

17 THE COURT: We agree that didn't happen.

18 MR. COONER: Okay, (b) is substituted service.
19 Substituted service is also not in play here because you need
20 to --

21 THE COURT: Right. (c)?

22 MR. COONER: (c) is mail service, and mail service,
23 incidentally, requires it to be done by ordinary mail,
24 certified mail, United States mail, not private service
25 mail. Regardless, though, it's effective only when there's



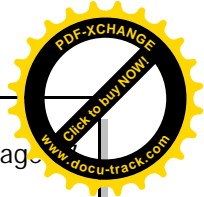
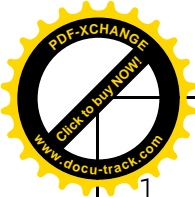
1 an answer or an appearance. A snapshot again, 7303: There
2 was no answer. There was no appearance. There was no
3 document in any way, shape, or form at that moment.

4 THE COURT: So you're saying, if everybody is
5 served on the same day this way, everyone becomes effective
6 at the same time, the defendants can jump the process, remove
7 it, and say, "I don't need the consent of anyone." In other
8 words, it's effective against all of them on the same day.
9 They say, "Ah-huh, we've got the better firm. We've figured
10 this out. We're jumping into Federal Court, and we don't
11 have to have the consent of the other folks because it's not
12 effective for another ten days."

13 MR. COONER: What I would say, your Honor, there,
14 defendants don't choose how to be served. It's the plaintiff
15 who goes, and the plaintiff is the one who initiates the
16 lawsuit, and they initiate the service of process. It's the
17 plaintiff who chooses to go in the (c) direction.

18 THE COURT: Okay, I understand, I think, the issue
19 right now. And I've got to actually cut people. We've got
20 to get to the Florida case. And I have a revocation hearing
21 at 3:30, so I need to -- is there one last --

22 MR. COONER: To underscore the point made by
23 Mr. Flynn, 60 days you have to answer or appear. If someone
24 were served today, they wouldn't have to answer until
25 March 27. If they entered an appearance, filed a notice of



1 appearance on St. Patrick's Day, and that somehow reverted
2 back to today, they would be out of time to answer. Our
3 rules stress --

4 THE COURT: Suppose you serve all fifteen
5 defendants on the same day this way, and then on the next day
6 only one of them removes and says, "Ah-huh, I don't need
7 anyone else's consent." That's your view as to how it
8 works?

9 MR. COONER: There's not effective service, that's
10 correct.

11 MS. BENEDETTO: If I may hand something up?

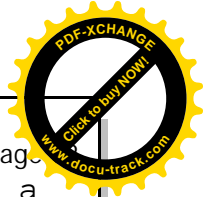
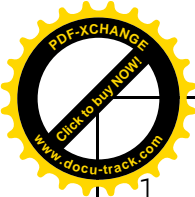
12 THE COURT: What is it?

13 MS. BENEDETTO: These are the documents produced by
14 Mr. Mustakoff. It's a whole packet. I'm only going to turn
15 to the documents, the pages that appear at MUST-000001 --

16 THE COURT: I tell you what, don't do it this way.
17 Send me a motion to supplement record and flag where you want
18 me to look, okay?

19 MS. BENEDETTO: Also, your Honor, in an effort to
20 save the issue of a deposition, instead of a deposition,
21 could Mr. Fernandez put forth an affidavit that he wants to
22 put forth to the Court? I think the problem is, he didn't
23 want to sign the affidavit that AstraZeneca wanted him to
24 sign. He'd sign an affidavit but --

25 THE COURT: If you work it out that way, I'm



1 happy. Otherwise, I don't know what the harm here is, take a
2 two-hour deposition. How long could the thing take?

3 MR. FLYNN: Your Honor, could I just add one thing
4 I forgot to mention? We've also served discovery on
5 plaintiffs, who have refused to produce documents, and
6 there's a hearing before Judge Bowler next week on February 2
7 on our motion to compel.

8 THE COURT: It's too late. All I'm going to do
9 right now is -- I don't want this to go forever. That's why
10 I did it. I'm annoyed that this didn't happen because I was
11 hoping to rule on the whole thing, you know, have something
12 tied up. I just want it all to happen within two weeks.

13 MR. FLYNN: And that means their producing
14 documents as well?

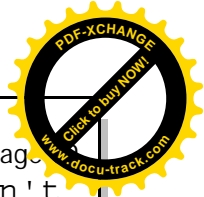
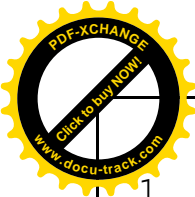
15 THE COURT: Yes. They've got to produce documents
16 unless they're privileged.

17 MR. FLYNN: And they have to produce a privilege
18 log. They've refused to do that.

19 THE COURT: You've got to produce a privilege log.
20 That's the way it works.

21 MR. FLYNN: Thank you, your Honor.

22 THE COURT: And the settlement papers aren't
23 privileged. Now, there may be other grounds, work product,
24 attorney-client. I mean, for sure there are others, joint
25 defense or joint, I guess, plaintiff's memos and that sort of



1 thing. But you've got to give a reason for it. But I don't
2 want to be here for the rest of my life on privilege issues.
3 You're either going to -- what's it? -- a clear and
4 convincing case or not. And I must say, to bring it back, I
5 wasn't happy. I don't believe that you thought it was not
6 material to say everyone consented or you wouldn't have put
7 it in. And I'm just saying that I don't know what legal
8 significance it all has, and I find that complicated. It's
9 just it shouldn't even be part of this case. It shouldn't
10 be.

11 MR. FLYNN: I understand, your Honor. We believe
12 it wasn't, but --

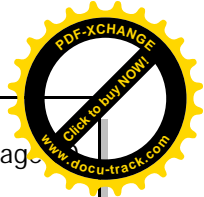
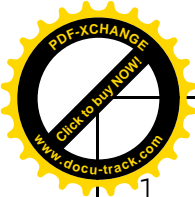
13 THE COURT: Okay, thank you. Now we're going to
14 just move on to Florida.

15 MR. THOMAS: Thank you, your Honor. Mark Thomas,
16 state of Florida. I'll be very brief, your Honor. I know
17 we're running short on time.

18 First of all, thank you very much for allowing the
19 state of Florida to appear. We're going to split our
20 argument today. Ms. Thomas, who represents the relator, is
21 going to handle the matters involving disputed substantial
22 federal question.

23 THE COURT: Can I actually start with this. I got
24 confused at some point with the --

25 MR. THOMAS: Yes, Judge.



1 THE COURT: What's the status of that other case?

2 There are two cases.

3 MR. THOMAS: Mylan and Alpharma?

4 THE COURT: Yes. And you practically begged to
5 come in, and I'm happy to have you in Boston, but I'm just
6 wondering why I shouldn't hear you and then just wait until I
7 hear from the other folks as well.

8 MR. THOMAS: It is our expectation that
9 Judge Hinkle in the Northern District will timely rule on the
10 state's motion for remand. While there has been a
11 conditional transfer order issued, we have anticipation that
12 Judge Hinkle will be ruling quickly in the Mylan case, and it
13 will not come up to this MDL.

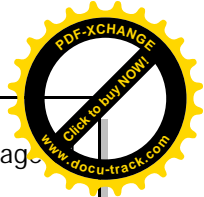
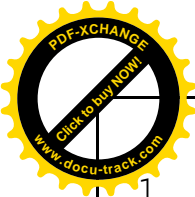
14 THE COURT: Well, when will I know?

15 MR. THOMAS: I had to turn my cell phone off prior
16 to coming into court, but I was hoping for a decision --

17 THE COURT: So it wasn't yours, huh?

18 MR. THOMAS: No, your Honor. I was hoping for a
19 decision before we began argument. It should be imminent.

20 THE COURT: Well, let me just say this: You'll
21 probably be the bottom of my barrel anyway because some of
22 these others will be easier to write, and yours is a more
23 complex analysis. So if in fact the other folks are still in
24 federal jurisdiction and they want a hearing, I would wait to
25 rule on yours till they got in here as well because that was



1 my big concern, as you can well imagine, that I not do it
2 twice, but here you are.

3 MR. THOMAS: Yes, your Honor, and glad to be here.
4 We will try and keep this simple. Actually, we're surprised
5 to hear that you find the Florida case one of the more
6 complex cases because we found it rather simple. Ms. Thomas
7 is going to be handling the disputed substantial federal
8 question argument. If necessary, I'll be happy to address
9 Justice Souter's more ephemeral Grable matters.

10 THE COURT: Not ephemeral, wholistic.

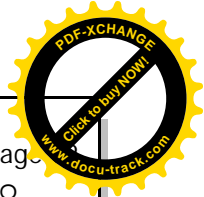
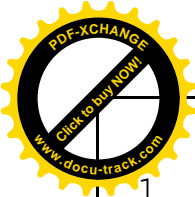
11 MR. THOMAS: Wholistic.

12 MS. THOMAS: Good afternoon, your Honor. Susan
13 Thomas from Berger Montague, who represent the relator
14 Ven-A-Care, who is the relator in the Florida case.

15 As Mr. Thomas -- no relationship, by the way --
16 indicated, we actually were quite surprised to hear your
17 Honor indicate that she thought there was a real issue with
18 Florida because the Florida case asserts claims under the
19 Florida False Claims Act and under Florida common law. These
20 claims are Medicaid price fraud only.

21 THE COURT: All right, so Medicaid, now, does
22 the -- I had a hard time understanding the statutory scheme.
23 Does your Medicaid state statute use the term "AWP"?

24 MS. THOMAS: It is in the statute and the regs,
25 your Honor, and indeed that is where the term "AWP" and "WAC"



1 come from in terms of pharmaceutical reimbursement. They do
2 not come from the federal statute or regs; they come from the
3 state.

4 THE COURT: All right, and do they -- this is what
5 I need to understand better and where you'll be very helpful
6 because it wasn't so clear from the briefings. So when they
7 use the word "average wholesale price," do they make specific
8 reference to as defined in the Medicare statute? I'd like to
9 see the statutory sections and the regs themselves. Do they
10 reference back to the federal standard?

11 MS. THOMAS: No, your Honor, they do not because
12 there isn't a federal statute.

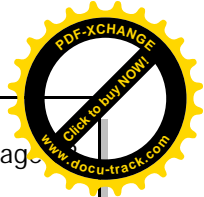
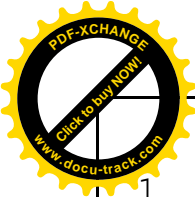
13 THE COURT: The federal statutory term, do they
14 reference back to the federal statutory term?

15 MS. THOMAS: There is a Medicare federal statutory
16 term, and they do not reference to that.

17 THE COURT: I actually know that, okay? They do
18 not --

19 MS. THOMAS: They do not reference to it. In
20 Medicaid, there is no federal term "AWP" and "WAC" because
21 Medicaid allows each state to set up its own plan and its own
22 reimbursement.

23 THE COURT: Right, and sometimes they piggyback on
24 the federal terms, and I just want to know, do they say --
25 does the Florida statute use the term "average wholesale



1 price"? You say "yes," right?

2 MS. THOMAS: Yes, it does. It uses that and "WAC."

3 THE COURT: Okay, and "wholesale acquisition cost,"
4 right?

5 MS. THOMAS: Yes.

6 THE COURT: And then they're defined by regulation,
7 right?

8 MS. THOMAS: They are not defined, which I'm sure
9 your Honor is familiar with at this point in this litigation.

10 THE COURT: Yes.

11 MS. THOMAS: But nor do they in any way reference
12 back to anything in the federal statute.

13 THE COURT: Okay, they do not reference back at all
14 to anything, you know, as defined in the federal statute
15 or --

16 MS. THOMAS: Absolutely not.

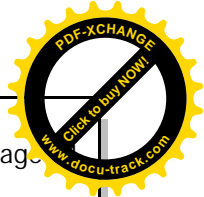
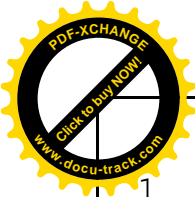
17 THE COURT: -- as codified in policies from the
18 Center for -- what is it, Medicare and -- what's it called?

19 MS. THOMAS: Medicare or Medicaid Services or
20 something?

21 THE COURT: Yes. So they don't reference back in
22 any way to federal standards, either in the statute,
23 regulation, or policy?

24 MS. THOMAS: That is correct.

25 THE COURT: All right, thank you.



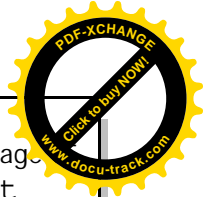
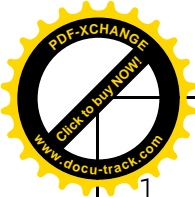
1 MS. THOMAS: And that is consistent with the way
2 the system is set up where although Medicaid is a jointly
3 funded federal and state program, it is primarily
4 administered by the states. And with respect to
5 pharmaceutical reimbursement, first of all, that's an option
6 of a state Medicaid program whether or not to reimburse to
7 cover pharmaceuticals, and then how they do it is governed by
8 state statute or regulations, and that is indeed as it is
9 done in Florida. So we have no Medicare copay claims, either
10 by the Medicaid state agency paying copays for dual eligibles
11 or as parens patriae on behalf of Florida citizens who are
12 themselves paying the Medicare copays. We have no Medicaid
13 rebate claims, which might well have been confusing from the
14 defendants' briefs because they spent pages and pages talking
15 about Medicaid rebates. They're not in our case.

16 THE COURT: Does Medicaid pay for the copays for
17 the Medicare patients who are poor?

18 MS. THOMAS: I believe it does, your Honor, but we
19 are not bringing those claims.

20 MR. THOMAS: Correct.

21 MS. THOMAS: So they're not in this case. And
22 there is no reference to Medicare AWP, which was the issue
23 that was presented to the Texas court where under the
24 physician reimbursement structure of the Texas Medicaid
25 program, physician reimbursement specifically looked to



1 Medicare AWP, and that became the question for decision that
2 the Federal Court there decided. Still sent it back, by the
3 way, still found there was not a substantial federal
4 question, but at least had something to think about. We
5 don't see anything to think about here.

6 THE COURT: Yes, but if I get a clear understanding
7 of the state statute, maybe I won't either, but what's not
8 crystal clear is, I'm dealing with how many different states
9 at this point?

10 MS. THOMAS: I understand, your Honor.

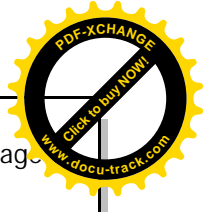
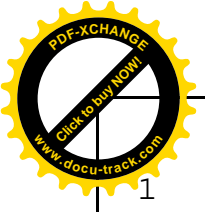
11 THE COURT: I understand there's a state statutory
12 scheme, and your point is that there are no policies,
13 regulations, or state statutes at the state level that
14 piggyback onto a federal standard?

15 MS. THOMAS: That is correct, with respect to the
16 terms "AWP" and "WAC."

17 THE COURT: And WAC. Thank you.

18 MS. THOMAS: I mean, they do use federal upper
19 limits. There's some other connections. Obviously they're
20 part of the federal Medicaid rebate program, but those are
21 not claims in our case. With respect these pricing terms,
22 they have no federal connotation.

23 THE COURT: So you're saying the FUL -- I'm glad
24 you reminded me of that -- is only relevant with respect to
25 the size of a rebate, and you're not challenging the rebates



1 here?

2 MS. THOMAS: Those are two different points, your
3 Honor.

4 THE COURT: Okay, well, go for it.

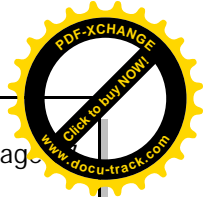
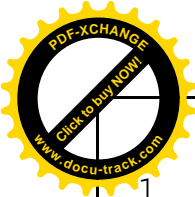
5 MS. THOMAS: The rebate is one issue, and we have
6 no claims pertaining to rebate. And if your Honor would ask
7 me, I would happily answer as to whether or not the relator's
8 still-sealed complaint has any allegations about rebates,
9 although I can't otherwise discuss that without your Honor's
10 permission. But I don't want your Honor to have a
11 misapprehension that there's something going on as it was in
12 California, if you remember back to that case.

13 THE COURT: Well, I'm reluctant to do that here
14 because there's a reason it's sealed and -- let me put it
15 this way: I'm asking you that question, but I don't want you
16 to answer here. I want you to answer in an in camera
17 affidavit.

18 MS. THOMAS: Okay. I will tell you that defendants
19 certainly have made no arguments that there is anything in
20 the still-sealed complaint that affects this Court's
21 decision.

22 THE COURT: Thank you.

23 MS. THOMAS: And I just, because I'm familiar with
24 what was going on in California, I just don't want there to
25 be a misapprehension on that point either.



1 THE COURT: All right, thank you very much.

2 I'm going to jump to defense at this point. Who's
3 handling this?

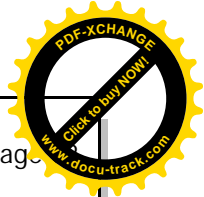
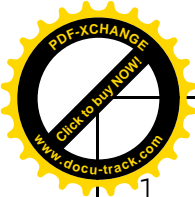
4 MS. THOMAS: Could I just take a few minutes to
5 address the arguments they make as to why --

6 THE COURT: No. Maybe on rebuttal if you do,
7 because I've got a pretty good understanding of what your
8 position is.

9 MR. FLEDER: Good afternoon, your Honor.

10 THE COURT: You spent a lot of time in your brief
11 talking about why this will affect certain aspects of
12 reimbursement by the federal government. Is that really the
13 limit of what you think the federal interest is at this
14 point?

15 MR. FLEDER: No, it isn't, your Honor. There are a
16 number of federal interests that are implicated by the
17 complaint in this case, and it's not just limited to the
18 words of the complaint, but as we've cited in our case, it's
19 the underlying claim. But just on the basis of the words in
20 the complaint, AWP and WAC do have meanings that have federal
21 implications. I think if you look at Judge Crabb's decision
22 in the Wisconsin case, which was both a Medicare and a
23 Medicaid decision, she said that the plaintiff's claims did
24 represent a substantial and disputed question of federal law
25 with regard to recoupment of alleged overpayments under the



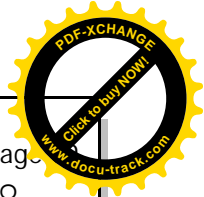
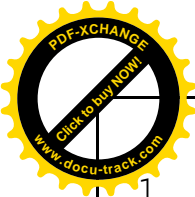
1 federal Medicaid and Medicare laws.

2 But in addition to AWP and --

3 THE COURT: Can I just say, I happen to agree under
4 Medicare. How it all balances out we can discuss, but if in
5 fact it's true that this is only under Medicaid and they
6 don't specifically reference back to the federal standards,
7 you're essentially asking me to draw the inference that
8 that's what it must be doing?

9 MR. FLEDER: It's more than that, your Honor,
10 because, first of all, Ms. Thomas made reference to the
11 federal upper limits. And as I understood what she was
12 saying, she was saying it's only relevant to the rebate. But
13 on Page 7 of their complaint, Paragraph 19, the state talks
14 about the way that reimbursement occurs independent of
15 rebates, and they talk about average wholesale price. That's
16 Factor A, B is wholesale acquisition costs, and C is the
17 federal upper limit. So they have put the applicability of
18 federal upper limit into the Florida statute and therefore
19 into the cause of action that they have brought in this
20 case.

21 But it does go beyond that because as we did say in
22 our case, in Paragraph 93 of their complaint, they are
23 seeking damages based on what they paid versus what they
24 think they should have paid, without obviously conceding that
25 they should have paid any less. By definition, by necessity,



1 there is a federal component in that analysis. There has to
2 be in two different respects: both the rebates that are paid
3 by the pharmaceutical companies to the state of Florida,
4 which obviously is set by federal law and by a federal
5 contract --

6 THE COURT: Isn't that basically a best price
7 benchmark?

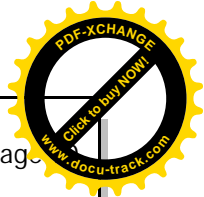
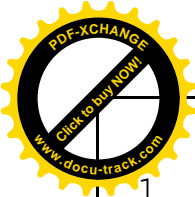
8 MR. FLEDER: Best price and average manufacturer's
9 price.

10 THE COURT: Right, so it's a different standard.

11 MR. FLEDER: It's a different standard, but it is
12 governed by federal common law, and it is governed by the
13 federal contract. And there's absolutely no doubt that if
14 the state were to be correct that they are entitled to
15 damages, by necessity this Court would have to get into
16 whether the rebates were proper because we would be seeking,
17 for certain, a setoff for any rebate payments that were
18 made: Were they too much? Were they too little? Were they
19 just the right amount?

20 THE COURT: But if I'm doing the balancing, the
21 Souter balancing, then I would say -- let's assume your
22 point, there is a federal interest here. Wouldn't the state
23 interest under its own statute with its own scheme outweigh
24 it?

25 MR. FLEDER: I don't think so, your Honor. Can I



1 just mention also the other part of this and then directly
2 answer your question? There's also the second side of this
3 which is the federal payment, the FFP made to the state of
4 Florida for the drugs that were purchased and are the subject
5 of this case. That is obviously something that has a very
6 direct federal interest.

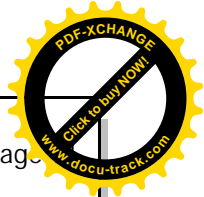
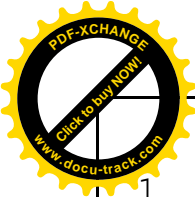
7 THE COURT: That's what you're saying, it affected
8 the amount of the FFP how you ruled on that.

9 MR. FLEDER: That's correct.

10 THE COURT: So I'm not denigrating at all your
11 argument that there's some federal interest here. The part
12 that I think -- I don't know your colleagues -- there would
13 be a lot of litigation over is, how do I balance that all
14 out? And that's why I said this was the hardest piece of
15 this. There's obviously some federal interest, but there's
16 also a strong state interest.

17 MR. FLEDER: Well, and we are not saying and have
18 not said that the state of Florida has no legal right to
19 bring a cause of action. That's not an issue in this case.
20 They could have brought a cause of action in state court.
21 They could have done what the Commonwealth of Massachusetts
22 did in a Medicaid case, which is to bring a cause of action
23 directly in Federal Court, the same cause of action, just
24 different venue.

25 Now, I'd like to just supplement on what Mr. Lynch

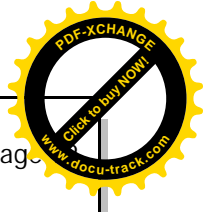
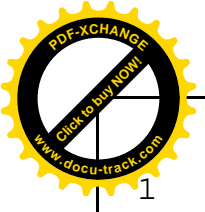


1 said and refer the Court to the recent decision in the
2 Santa Clara case where the judge -- this is the County of
3 Santa Clara V. Astra U.S.A., Inc.

4 THE COURT: Could you remind me, was that Medicaid
5 or Medicare?

6 MR. FLEDER: I believe it was Medicare, but what
7 the court did was go into a great analysis, and I'll just
8 read a short paragraph: "Santa Clara nevertheless argues
9 that shifting cases to Federal Court premised on
10 pharmaceutical companies' overcharges would disrupt the
11 proper federal-state balance. There is, however, no
12 Congressionally approved balance of judicial responsibilities
13 in this arena. Counsel for Santa Clara also argued that
14 Pharmacy and Wisconsin, two of the recent state cases,
15 persuasively found that federalizing a case such as this one
16 would upset the proper balance of judicial responsibilities.
17 This order disagrees. This order also disagrees with the
18 Wisconsin court's suggestion that moving all state cases
19 involving drug price into Federal Court would work a
20 destruction akin to that feared by the Merrill-Dow court."

21 So let's look at what Congress intended with regard
22 to Medicaid lawsuits. To the extent that Congress has said
23 anything in the statute, the Medicaid statute, there is not a
24 word, as we looked at it recently, there's not a word, your
25 Honor, that suggests that any Medicaid case should be going



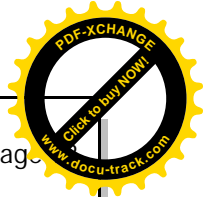
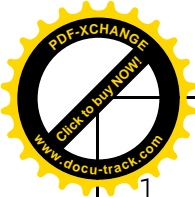
1 to state court.

2 Now, we're not saying that no Medicaid case should
3 go to state court. What we're saying is, if you look at the
4 statute, if there's judicial review provisions at all, they
5 go into Federal Court. And just like the recent case that we
6 cited in our brief that's going to be heard by the Supreme
7 Court is a dispute between what I believe is a resident of
8 the state of Arkansas and the Arkansas Medicaid agency, and
9 we went back and looked, and the District Court took
10 jurisdiction under federal question jurisdiction, 28 U.S.C.
11 1331. There's a legion of cases involving Medicaid questions
12 that are brought in Federal Court under federal question
13 jurisdiction. So using the --

14 THE COURT: Well, it's a partnership. I've written
15 so much in this area. I think in one of my opinions, I mean,
16 both sides are allowed to bring suits frequently. I mean, it
17 authorizes, in fact encourages, Medicaid to police its own
18 program.

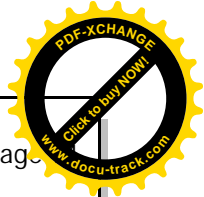
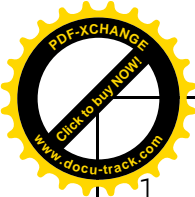
19 MR. FLEDER: And, again, we're not disputing the
20 state of Florida's right to bring a suit. The question is,
21 using the Grable analysis and your Honor's prior rulings,
22 where does this case best lie? And we submit that the answer
23 is very clear.

24 THE COURT: Okay, thank you. I understand that.
25 All right, as I say, I have a revocation coming up. I need



1 to just report to counsel on a few things. I did talk to
2 Professor Berndt, and I basically cut him loose, so there
3 will be no need for further payments. I told him that I very
4 much valued his services and would very much like to use him
5 if I need him on a motion for summary judgment. I didn't
6 know exactly when that would be happening, and I wasn't sure
7 whether or not he would take a case, a client or whatever, in
8 the interim that would preclude that. So I just left it with
9 him that I'd deal with it at the time. But what I want to be
10 quite clear on is, I don't need his services any more for
11 class cert, and so plaintiffs are not obligated or defendants
12 to pay, you know, the bookmark expenses that you were
13 incurring to hold onto him.

14 As far as I'm concerned, I did yesterday or today
15 or something receive a letter response from defendants, as
16 well as I got a letter from plaintiffs, about the class cert
17 motion. I don't like letters, so just please in the future,
18 just do it in memos. But that's it. I don't want any more
19 briefing on it, and I'll just take that under advisement. I
20 need to work on that, and I'll hopefully get something out
21 soon on that. And so I think that that record is pretty much
22 closed unless I -- I haven't even read the defense response
23 yet because I've been in court all day, but unless I don't
24 understand something, I certainly am not going to take up any
25 new arguments. I'm just not even going there, so you don't



1 need to reply to anything new. I'm just going to take what
2 I've got and rule, hopefully next week, but for sure by the
3 following week.

4 MR. MONTGOMERY: Your Honor, you also asked us last
5 week to discuss scheduling going forward in the MDL. We have
6 done that, and you will see when it comes across your desk
7 that we have substantial differences on how to schedule the
8 case going forward. And I know you have a revocation
9 hearing, but if you'd like us to stick around, I think we
10 could resolve that in a few minutes.

11 THE COURT: I have no idea how long that will be,
12 so I think that probably not. Just give me just two
13 different versions, and I'll rule.

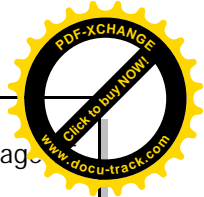
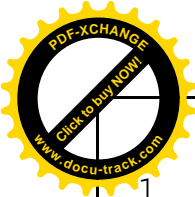
14 MR. MONTGOMERY: We have already done that but
15 without any supporting argument.

16 THE COURT: Local 68, without killing yourselves,
17 how much longer to finish up, to clean up this last piece of
18 discovery, which is one deposition and/or an affidavit and
19 the production of documents and/or privilege log by
20 plaintiffs?

21 MS. BENEDETTO: One week, your Honor.

22 THE COURT: One week? Could you all do that in a
23 week?

24 MR. FLYNN: Yes, your Honor. Assuming we get the
25 documents, we could pursue the deposition.



1 THE COURT: Why don't we just say two weeks so
2 there are no associates doing round-the-clock, okay? Can we
3 do that? And so two weeks just to clean up the discovery,
4 and within that time period, no longer than a five-page
5 supplemental brief, if it's warranted by whatever comes in.
6 No reply briefs or replies or whatever, just if you need a
7 cleanup brief on anything new that's learned.

8 MS. BENEDETTO: So simultaneously submitted
9 supplemental briefs on --

10 THE COURT: That's fine, okay, and with the
11 attachments --

12 MS. BENEDETTO: Two weeks from today, Friday? I'm
13 sorry, I don't have a calendar.

14 THE COURT: Two weeks puts us at --

15 MS. BENEDETTO: February 10?

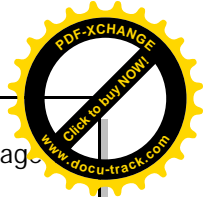
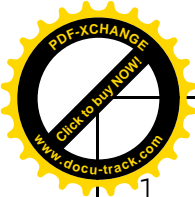
16 THE CLERK: February 10.

17 MR. FLYNN: Your Honor, will you issue a written
18 order for Mr. Fernandez so he knows he has to act?

19 THE COURT: That's a good point. I suppose I
20 should do that, although I'm assuming that you all always
21 order these transcripts. So Ms. Marzilli is in the middle of
22 a big trial. I don't know when she can get it out, but if
23 you want to give me a draft of one, I'll work on it.

24 MR. FLYNN: We'll submit an order, your Honor.

25 THE COURT: Okay. And you flew up from Florida,



1 right?

2 MS. THOMAS: I flew up from Philadelphia actually.
3 Mr. Thomas flew up from Florida.

4 THE COURT: Anyone who would fly up from Florida --

5 MS. THOMAS: We would like a few more minutes, or,
6 alternatively, a chance to submit a simultaneous three- or
7 four-page --

8 THE COURT: No. I think I've got the gravamen of
9 this.

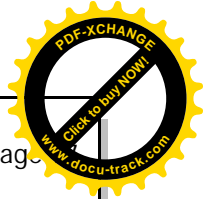
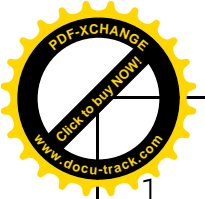
10 MS. THOMAS: I mean, truthfully, if Florida
11 stays -- I don't want to antagonize all the other AGs here --
12 every case that has been before your Honor and that is now
13 before your Honor would still be here. Every case has state
14 Medicaid price fraud claims, and you have routinely sent them
15 back if they don't have something more.

16 THE COURT: Thank you. I've got that point.
17 Anything you want to add?

18 MR. THOMAS: That's it your Honor. Under Grable,
19 if Florida stays in Federal Court, they're all coming to you,
20 every single one of them. There is no case more
21 state-specific than the Florida case.

22 THE COURT: Thank you very much. Have a wonderful
23 weekend. And if I need you on case management, I'll let you
24 know.

25 MR. LYNCH: Your Honor, could I throw out one



1 more --

2 THE COURT: No, no. I've got this revocation.

3 Sorry, sorry.

4 THE CLERK: Court is in recess.

5 (Adjourned, 3:40 p.m.)

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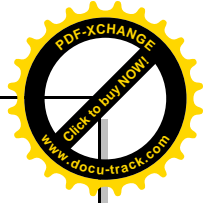
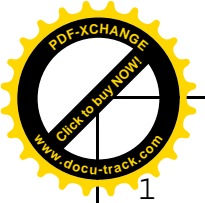
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C E R T I F I C A T E

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3
4 UNITED STATES DISTRICT COURT)
5 DISTRICT OF MASSACHUSETTS) ss.
6 CITY OF BOSTON)
7

8 I, Lee A. Marzilli, Official Federal Court
9 Reporter, do hereby certify that the foregoing transcript,
10 Pages 1 through 77 inclusive, was recorded by me
11 stenographically at the time and place aforesaid in Civil
12 Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical
13 Industry Average Wholesale Price Litigation, and thereafter
14 by me reduced to typewriting and is a true and accurate
15 record of the proceedings.

16 In witness whereof I have hereunto set my hand this
17 15th day of February, 2006.
18
19
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23 _____
LEE A. MARZILLI, CRR

24 OFFICIAL FEDERAL COURT REPORTER
25